

**FITZPATRICK,
KEVIN**

Summary Statement for Deposition Publication

**submitted pursuant to
Order Granting Appellant's Motion to Publish Depositions
of Ecology Managers and CR 30(b)(6) Designated Witnesses
dated March 19, 2002**

***ACC & CASE v. Dept. of Ecology & Port of Seattle,
PCHB No. 01-160***

Deponent: KEVIN FITZPATRICK

Date of Deposition: JANUARY 16, 2002

1. Admissibility

A. Purpose used for or what it will be offered to prove: lack of reasonable assurance for 401 with respect to water quality, fill, and low flow. Mr. Fitzpatrick is one of the Ecology personnel who has been explicitly cited by Gordon White (the 401 signator) and others as providing a basis for reasonable assurance.

B. Specific designation (if CR 30(b)(6) deponent): Mr. Fitzpatrick is the Section Manager of the Water Quality Program in Ecology's Northwest Regional Office. He is designated as an Ecology witness concerning, among other matters, water quality, fill and low flow.

C. Basis for admissibility if challenged by objection: If an objection is attached pursuant to provision 4 below, ACC's and CASE's response is also attached.

2. Excerpting: The following portions of the FITZPATRICK deposition are offered by ACC and CASE:

<u>START</u>		<u>END</u>
Page 1, line 1	through	page 7, line 7
Page 10, line 7	through	page 10, line 24
Page 11, line 25	through	page 13, line 16
Page 15, line 14	through	page 53, line 17
Page 54, line 23	through	page 58, line 7
Page 60, line 8	through	page 72, line 14
Page 79, line 12	through	page 80, line 10
Page 82, line 2	through	page 89, line 11
Page 94, line 9	through	page 95, line 20
Page 99, line 24	through	page 110, line 1
Page 116, line 24	through	page 119, line 12

Page 122, line 17 through
Page 135, line 24 through
Page 151, line 13 through

page 126, line 22
page 150, line 17
page 172, line 18

3. **Counter Provisions of Respondents:** See attached.
4. **Objections of Respondents:** See attached.

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ACC & CASE v. Dept. of Ecology & Port of Seattle
PCHB No. 01-160

Department of Ecology's Designation of Additional Portions of
Deposition and Objections Entered Pursuant to the
Board's Order of March 19, 2002 and Port of Seattle's
Joinder in those Objections and Designations

Deponent: **Kevin Fitzpatrick**

Date of Deposition: **January 16, 2002**

3. Counter Excerpts by Respondent Department of Ecology:¹

<u>START</u>	<u>END</u>
Page 91, line 23	page 94, line 8
Page 128, line 16	page 132, line 1
Completed Correction and Signature Page	

4. Objections to Designations by Appellants:

A deposition is admissible in this hearing only to the extent that the same testimony would be admissible in this hearing if the deponent were then present and testifying as a witness. CR 32(a); WAC 371-08-300(1) and (2). Therefore, Ecology renews its objection to publication of this transcript and submits the following objections to particular portions of the transcript.

General objections: Mr. Fitzpatrick has testified before the Board in this matter and Ecology has not had the opportunity to review the hearing transcript. Mr. Fitzpatrick's deposition was used during his testimony. To the extent ACC and CASE now designate those portions of the deposition referenced during his testimony, Ecology objects to those portions of the transcript as asked and answered.

Inadequate foundation laid regarding witnesses specific areas of technical expertise.

<u>START</u>	<u>END</u>	<u>OBJECTION</u>
Page 22, line 23	page 23, line 20	Calls for legal conclusion (objection made on record by Gil Reavis).
Page 23, line 21	page 24, line 20	Calls for legal conclusion.

¹ By designating counter excerpts, Ecology does not waive its objections to ACC's and CASE's publication of this transcript. Those objections are reflected in Ecology's Response to Appellants' Motion to Publish and in argument before this Board. Further, Ecology does not waive its objections to ACC's and CASE's use of particular portions of the transcript. Those objections are identified in subsection 4 of this document.

Page 25, line 2	page 25, line 23	Calls for legal conclusion, lack of foundation.
Page 31, line 17	page 32, line 16	Calls for legal conclusion.
Page 32, line 21	page 33, line 3	Calls for legal conclusion.
Page 39, line 13	page 40, line 1	Calls for legal conclusion, vague and ambiguous.
Page 45, line 7	page 46, line 1	Calls for legal conclusion (objection made on record by Tom Young).
Page 46, line 2	page 46, line 10	Calls for legal conclusion.
Page 49, line 14	page 50, line 1	Mischaracterizes prior testimony.
Page 57, line 23	page 58, line 7	Foundation, speculation.
Page 62, line 19	page 63, line 1	Foundation, speculation.
Page 79, line 18	page 80, line 1	Foundation, speculation, vague and ambiguous.
Page 82, line 2	page 82, line 15	Argumentative.
Page 86, line 9	page 86, line 11	Calls for legal conclusion.
Page 86, line 12	page 86, line 18	Ambiguous, legal conclusion.
Page 88, line 15	page 88, line 21	Argumentative (objection made on record by Tom Young).
Page 88, line 22	page 89, line 11	Argumentative.
Page 94, line 9	page 94, line 23	Ambiguous.
Page 104, line 5	page 104, line 20	Relevance.
Page 106, line 6	page 106, line 17	Argumentative.
Page 124, line 21	page 125, line 9	Not posed as question, argumentative (objection made on record by Tom Young).
Page 138, line 17	page 140, line 1	Calls for legal conclusion.
Page 142, line 5	page 142, line 18	Vague (objection made on record by Gil Reavis).
Page 144, line 20	page 145, line 22	Foundation (objection made on record by Tom Young).
Page 145, line 23	page 146, line 10	Document speaks for itself (objection made on record by Tom Young).
Page 148, line 15	page 149, line 9	Foundation (objection made on record by Tom Young).
Page 149, line 10	page 149, line 19	Speculation.
Page 160, line 11	page 160, line 16	Foundation, ambiguous, speculation (objection made on record by Gil Reavis).
Page 160, line 17	page 160, line 20	Foundation, ambiguous, speculation.

Page 160, line 17	page 160, line 20	Foundation, ambiguous, speculation.
Page 169, line 22	page 170, line 4	Compound (objection made on record by Gil Reavis).
Page 170, line 20	page 171, line 13	Foundation

PORT JOINS ECOLOGY'S DESIGNATIONS AND OBJECTIONS

Counsel for the Port of Seattle have reviewed Ecology's designations and objections. The Port joins in all of Ecology's designations and objections.

**Appellants' Responses to Objections Raised by Ecology and the Port
To The Publication of Depositions of Ecology Managers and
CR 30(b)(6) Witnesses**

***ACC & CASE v. Dept. of Ecology & Port of Seattle,*
PCHB No. 01-160**

**Deponent: Kevin Fitzpatrick, Water Quality Program Section Manager, Ecology
Northwest Regional Office**

Date of Deposition: January 16, 2002

Responses to Ecology's Objections:

For the publication of the deposition of Mr. Fitzpatrick, Ecology raises forty-eight (48) specific objections. Ecology's objections are addressed below.

- 1. Objection:** "Calls for legal conclusion." (10 specific objections, including two made on record.)

During the hearing, AAG Jeff Kray argued on behalf of Ecology that Ecology's employees are charged with interpreting and implementing Washington's water quality laws and regulations, and that they are therefore entitled to testify as to legal conclusions. The Board accordingly overruled objections that questions put to Ecology employees "called for legal conclusions," stated that Ecology employees could so testify, and indicated that responses would be given appropriate weight. This result is particularly appropriate here, where the deponent was previously the NPDES Facility and Permit Manager for Sea-Tac International Airport (page 13 lines 8-16), served as the Unit Supervisor for the Northwest Regional Office's Industrial Permit Unit for ten years (page 12, lines 21-23), and is presently the Water Quality Program Section Manager for Ecology's Northwest Regional Office (page 12, line 23 through page 13, line 7).

- 2. Miscellaneous Objections as to Form Where No Objection Was Made On The Record:** Lack of foundation, vague, ambiguous, speculation, argumentative (23 objections).

Under the Civil Rules, Ecology and the Port waived these objections by failing to make them at the deposition, when the questions could have been revised to cure any infirmity. CR 32(b) enables respondents to make objections to admissibility, but this authority is explicitly subject to the provisions of "subsection (d)(3) of this rule" -- CR 32(d)(3). Under CR 32(d)(3)(B),

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"Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

CR 32(d)(3)(B) (emphasis added). Respondents failed to seasonably present these objections to the form of the question at the taking of the deposition, thereby deprived appellants any opportunity to cure any defects, and thereby waived the objections.

3. **Specific Objection:** Page 39, line 13 through page 40, line 1 (Calls for legal conclusion, vague and ambiguous).

Appellants withdraw their designation of the cited lines (Page 39, line 13 through page 40, line 1)

4. **Specific Objection:** Page 88, line 15 through page 88, line 21 ("Argumentative (objection made on the record by Tom Young)"):

Appellants withdraw their designation of the cited lines (Page 88, line 15 through page 88, line 21)

5. **Specific Objection:** Page 104, line 5 through Page 104 line 20 (Relevance):

The question and answer are directly relevant to the 401 appeal. The author of the 401, Ann Kenny, testified that she relied on Mr. Fitzpatrick for the water quality sections of the 401. (Kenny Dep. page 42, lines 6-7; page 43 at 20-22.) Thus, Mr. Fitzpatrick's understanding of Ecology's obligations under the Clean Water Act are probative of legal and factual issues on appeal. Specifically, Mr. Fitzpatrick's understanding of the extent to which the Clean Water Act requires Ecology to impose effluent limits on concentrations of copper in the Port's stormwater discharges affects Ecology's ability to assure that the Port's stormwater discharges comply with water quality standards. This is particularly so because Ecology has asserted that the 402 NPDES Permit helps give Ecology reasonable assurance that the proposed third runway and MPU projects will not result in violations of water quality standards. If Mr. Fitzpatrick believes that Ecology has no obligation beyond requiring the Port to apply basic BMP's regardless of their effectiveness in removing dissolved copper from stormwater, this indicates that future NPDES Permits likely will not assure the Port's compliance with water quality standards.

6. **Specific Objection:** Page 124, line 21 through page 125, line 9 (Not posed as question, argumentative (objection made on record by Tom Young):

Appellants withdraw their designation of the cited lines (Page 124, line 21 through page 125, line 9)

7. **Specific Objection:** Page 142, line 5 through page 142, line 18 ("Vague (objection made on record by Gil Reavis)");

As the transcript plainly reflects, Mr. Reavis's only objection was to the question posed at page 142, line 5. There was no objection to the revised question posed at page 142, line 8. Respondents waived any objection to the form of the revised question (i.e., vagueness) by failing to object to the revised question. CR 32(d)(3)(B).

8. **Specific Objection:** Page 144, line 20 through page 145, line 22 ("Foundation (objection made on record by Tom Young)");

Appellants withdraw their designation of the cited lines (Page 144, line 20 through page 145, line 22)

9. **Specific Objection:** Page 145, line 23 through page 146, line 10 ("Document speaks for itself (objection made on record by Tom Young)");

Appellants withdraw their designation of the cited lines (Page 145, line 23 through page 146, line 10)

10. 9. **Specific Objection:** Page 148, line 15 through page 149, line 9 ("Foundation (objection made on record by Tom Young)");

As the transcript plainly reflects, Mr. Young's only objection was to the question posed at page 148, line 15. There was no objection to the revised question posed at page 148, line 24. Respondents waived any objection to the form of the revised question (i.e., foundation) by failing to object to the revised question. CR 32(d)(3)(B).

11. **Specific Objection:** Page 160, line 11 through page 160, line 16 ("Foundation . . . (objection made on record by Gil Reavis)");

Appellants withdraw their designation of the cited lines (Page 160, line 11 through page 160, line 16)

12. **Specific Objection:** Page 169, line 22 through page 170, line 4 ("Compound (objection made on record by Gil Reavis)");

The question resulted in no response, and was revised upon objection. The question should be retained to provide context for the subsequent colloquy.

**DEPOSITION UNDER
ORAL EXAMINATION OF
KEVIN FITZPATRICK
JANUARY 16, 2002
ACC VS. STATE OF WA, et al.**

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AR 028461

JAN 31 2002

1 POLLUTION CONTROL HEARINGS BOARD
 2 FOR THE STATE OF WASHINGTON
 3
 4 AIRPORT COMMUNITIES COALITION,
 5 Appellant,)
 6 vs.) PCHB No. 01-160
 7 STATE OF WASHINGTON,)
 8 DEPARTMENT OF ECOLOGY; and)
 9 THE PORT OF SEATTLE,)
 10 Respondents.)

11
 12 DEPOSITION UPON ORAL EXAMINATION
 13 OF
 14 KEVIN FITZPATRICK
 15

16
 17 9:00 A.M.
 18 JANUARY 16, 2002
 19 1325 FOURTH AVENUE, SUITE 1500
 20 SEATTLE, WASHINGTON
 21
 22
 23
 24

25 DIANE MILLS, CSR# MI-LL-SD-M380N3 JAN 31 2002

1

I N D E X

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3	EXAMINATION BY:	PAGE(S)
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6		
7		
8		
9		
10		
11	EXHIBITS FOR IDENTIFICATION	PAGE
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2

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 2
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 21 Marten Brown
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 23 Suite 2200
 24 Seattle, Washington 98101
 25

1 SEATTLE, WASHINGTON; JANUARY 16, 2002
 2 9:00 A.M.
 3 --oOo--
 4
 5 KEVIN FITZPATRICK,
 6 sworn as a witness by the Notary Public,
 7 testified as follows:
 8

EXAMINATION

9
 10
 11 BY MR. POULIN:
 12 Q. Could you please state and spell your name
 13 for the record.
 14 A. Yes. My name is Kevin, K-e-v-i-n, middle
 15 initial C, last name Fitzpatrick,
 16 F-i-t-z-p-a-t-r-i-c-k.
 17 Q. Kevin, I'm Rick Poulin, I'm representing ACC
 18 and also CASE in this appeal.
 19 Have you had your deposition taken before?
 20 A. Yes, I have.
 21 Q. Are you somewhat familiar with the procedures
 22 and the process, then?
 23 A. Somewhat. I haven't had it taken that often,
 24 but.
 25 Q. When was the most recent deposition you've

1 participated in?
 2 A. I believe it was five or six years ago.
 3 Q. Well, in case it's helpful, I'd like to
 4 explain some of the instructions. I will ask questions
 5 and wait for a verbal response from you. We need to
 6 make a record today, so head shakes and noises other
 7 than yes or no may not be clear on the record.
 8 It's important that you understand the
 9 question that I'm asking, so if you don't know what I'm
 10 getting at, please let me know. If you find anything
 11 confusing, I hope you'll bring it to my attention.
 12 Would you do that, please?
 13 A. Yes, I will.
 14 Q. Is there any reason you wouldn't be able to
 15 give clear answers today?
 16 A. No.
 17 Q. Are you under any medications or prescription
 18 drugs?
 19 A. No.
 20 Q. Have you had any alcohol recently?
 21 A. No.
 22 Q. Could you please explain what kinds of
 23 preparation you've undertaken to get ready for today's
 24 deposition?
 25 A. Could you explain that question just now?

1 the same way that I reviewed Dr. Strand's Declaration,
 2 that of Tom Luster. And these were Declarations that
 3 were made in support of ACC's Motion for Stay. And I
 4 think I did read through the recent decision from the
 5 PCHB.
 6 Q. Is this the decision for the Motion for Stay?
 7 A. Correct.
 8 Q. Have you also read the Board's ruling on the
 9 Cross Motions for Summary Judgment in the NPDES permit
 10 modification appeal that CASE brought?
 11 A. Yes, I did. That was probably the most
 12 recent thing. In that case I was more focused on, you
 13 know, what our obligations were from the PC H B
 14 decision in terms of the corrections that they're
 15 asking us to make to the facts sheet.
 16 Q. What do you understand those obligations to
 17 be?
 18 A. The way I interpret that is that the facts
 19 sheet was remanded to Department of Ecology to include
 20 the outfall locations for stormwater outfalls
 21 associated with construction activity.
 22 Q. Do you know whether the Department plans to
 23 have a new public process as part of that facts sheet
 24 correction?
 25 A. Whether we have -- what do you mean by "new

1 What do you mean by "preparation"? Do you mean -- --
 2 related to what?
 3 Q. What documents have you reviewed to come up
 4 to speed for this session?
 5 A. I think in the past several weeks what I
 6 reviewed included a review again of the 401 Water
 7 Quality Certification that was issued plus the amended
 8 certification. I believe I also reviewed a Declaration
 9 I gave earlier related to another case, actually, one
 10 that was brought by CASE on the appeal of the major
 11 modification to the NPDES permit.
 12 I recall reviewing the NPDES permit and the
 13 facts sheet. But in both instances those were I think
 14 during the holiday period, so my recollection of those
 15 may be a bit fuzzy right now. I reviewed those in
 16 anticipation of what was supposed to be my original
 17 deposition date which was back in December, and I
 18 haven't done that much preparation since that time.
 19 Q. Have you reviewed any of the transcripts of
 20 the other depositions that have taken place in this
 21 appeal?
 22 A. I think I also glanced through the
 23 deposition -- or I'm sorry, the Declaration of
 24 Dr. Strand, Dr. Jonathan strand, and I glanced
 25 through -- did not review in detail, certainly not in

1 public process"?
 2 Q. Does the Department intend to give the public
 3 an opportunity to comment on the information that will
 4 now be included in the facts sheet pursuant to the
 5 Board's order?
 6 A. The way that we interpret this presently is
 7 that what the PCHB is requiring of us is not a major
 8 modification, therefore, we would not put this through
 9 the public notice on draft. Certainly when we do issue
 10 any modification, that action is subject to appeal
 11 within 30 days after we issue it.
 12 But if your question is will we do a public
 13 process similar to what is done for major permit
 14 modification, the answer is no.
 15 Q. And understanding your point that the Board
 16 has not mandated a major modification, will Ecology use
 17 its discretion under the minor modification process to
 18 determine that public notice is appropriate since the
 19 Board determined that important information was
 20 withheld from the public?
 21 A. Using our Department discretion, we feel it's
 22 important to satisfy the Board's concerns here
 23 immediately, and so we don't want to weigh this down
 24 further or drag it out further through another lengthy
 25 round of public notice process which would not -- is

1 not required, and as you rightly put it, is up to the
2 discretion of the Department of Ecology, since this is
3 a minor modification to the facts sheet.

4 Q. Back to your preparation for today's
5 deposition. Have you in fact reviewed any of the
6 transcripts of other depositions that took place in
7 this appeal?

8 A. No. None of those have been made available
9 to me.

10 Q. Could you please tell me about your
11 educational background.

12 A. Certainly. My undergraduate degree is a
13 bachelor of science from Loyola University in Chicago,
14 and I have a graduate degree, M.A. in zoology, at
15 Southern Illinois University in Carbondale, Illinois.

16 In addition to that, I held a commission in
17 the United States Coast Guard completing Officer
18 Candidate School in the United States Coast Guard back
19 in 1980. And I retired from the United States Coast
20 Guard Reserve in December of 2000, retired as a
21 lieutenant commander in the United States Coast Guard
22 Reserve.

23 Q. Do you recall the years of your degrees?

24 A. Oh, certainly. My B.S. from Loyola
25 University was 1975, and my M.A. from Southern Illinois

1 parties in that appeal, or the year of the proceedings?

2 A. I remember that this may be -- my best
3 recollection is that it may have been back in '94 or
4 '95. It was at a time when our water resources prog.
5 was putting out a number of decisions.

6 And I do recall what was being contested, and
7 what was being contested was the agency's assertion on
8 water continuity. And in particular I believe this was
9 in the Issaquah Subbasin, Issaquah Creek Subbasin, what
10 was being contested in the appeal by groups like the
11 East Lake Sammamish Water District. They were trying
12 to assert that there was no hydraulic continuity
13 between the stream and groundwater.

14 Q. I appreciate that. We don't really need
15 to --

16 A. Well, I do recall, though, that one of the
17 witnesses for the East Lake Sammamish Water District
18 who was trying to assert that there was no hydraulic
19 continuity was one of the consultants for ACC right
20 now, and that's Dr. Peter Welling. I thought that was
21 very interesting.

22 Q. And do you recall the ultimate decision in
23 that case?

24 A. Yeah. The agency was upheld by the PCHB.

25 Q. Thank you. Please tell me about your work

1 University is in 1981.

2 Q. You stated earlier that you have been deposed
3 before. Have you served as a witness in any appeal of
4 a lawsuit?

5 A. I have not served as a witness in any appeal
6 of a lawsuit, no.

7 Q. Have you ever been qualified as an expert?

8 A. Yes.

9 Q. What were those circumstances?

10 A. The instance that I recall was a Pollution
11 Control Hearings Board series of cases in which some
12 water rights decisions were being appealed, and I was
13 called upon by Water Resources to act or to testify as
14 the water quality expert for water quality issues in
15 what we refer to the Cedar Green water quality
16 management areas. Because at that time I was acting as
17 a watershed lead for those water quality management
18 areas.

19 Q. And so you were qualified as a water quality
20 expert in that proceeding?

21 A. Yes. My recollection is is that I was
22 presented and then qualified before the PCHB as being
23 able to give expert testimony on water quality matters
24 within those watersheds.

25 Q. Do you remember any of the names of the

1 history with the Washington State Department of
2 Ecology.

3 A. I started working for the Department of
4 Ecology in 1986, coming off of active duty in the U.S.
5 Coast Guard. And my first job with the Department of
6 Ecology, I was the agency's first environmental crimes
7 investigator. At that time I was working for what was
8 then in the agency called central programs as the
9 agency's environmental crimes investigator. I did that
10 job from '86 until '88.

11 And then from '88 until -- I think that was
12 from '88 until 1990, I was a water quality inspector at
13 Ecology's Northwest regional office. Then I went back
14 for about a year and a half to serve on the -- again as
15 the state's environmental crime investigator on a
16 state/federal environmental crime task force that was
17 headed up by EPA's Office of Criminal Investigation.

18 And then I returned in about '91 to Ecology's
19 Northwest regional office to supervise the industrial
20 permit unit in the water quality section at the
21 Northwest regional office. And then from '91 until
22 2001, I was the unit supervisor for the industrial
23 permit unit. And in February of 2001 I became section
24 manager for the water quality program in the Northwest
25 region.

1 Q. What date in 2001 did that take place?

2 A. February 18th.

3 Q. And that was section head for the water
4 quality --

5 A. Program at Northwest region, section manager.
6 I think it reads as section manager on my business
7 card.

8 Q. Have you ever served as the permit or
9 facility manager for the Port of Seattle's NPDES permit
10 at Sea-Tac International Airport?

11 A. Yes, I did, on an interim basis. I'm trying
12 to recall when that happened. I think in late 1999 I
13 took on those responsibilities because the facility
14 manager that we had for NPDES permit, Lisa Austin, left
15 the agency, and so as the unit supervisor, I inherited
16 those responsibilities.

17 Q. What is the relationship of unit supervisor
18 to a facility manager?

19 A. Unit supervisor is -- the way we're organized
20 at Northwest regional office in our water quality
21 section is the unit supervisor tries to do an -- or
22 does an analysis of what the workload is out there with
23 respect to permits and to equitably divide those up,
24 and also to rely on particular people's expertise let's
25 say in the industrial sector or stormwater engineering

1 A. Well, first-line supervisor is someone who is
2 aware of the technical challenges that a facility
3 manager is facing and, you know, tries to make the
4 facility manager aware of program commitments that we
5 have, work commitments that we have, and at the same
6 time make management aware of the resource constraints
7 and challenges that the facility manager is facing.

8 Q. And in that sense, by "management" you mean
9 upper management above the unit supervisor level?

10 A. Well, you go the next chain up. You take
11 that up to the section manager, and then the section
12 manager in turn can relay that to the water quality
13 program manager.

14 Q. With respect to NPDES permits, are all
15 aspects of permit management such as enforcement,
16 compliance and review of required submittals, is that
17 all handled within the section or are there other
18 branches, other units that participate?

19 A. In the case of the Northwest regional office,
20 that would all be handled -- if it is a permit assigned
21 to the industrial permit unit, that would be handled
22 within the industrial permit unit.

23 Q. Do I understand that there's recently been a
24 change in the name of the industrial permit unit; is
25 that right?

1 expertise. And try to match up that workload and
2 manage that workload as best they can with the
3 available human resources that we have, which are for
4 the most part what we have in the industrial unit, our
5 facility managers who are either environmental
6 engineers or environmental specialists.

7 Q. Is the unit supervisor involved in oversight
8 of permit management?

9 A. The oversight that they provide is only as
10 much as -- well, I shouldn't say "only." The facility
11 manager is the individual with the primary
12 responsibility of tracking compliance with a given
13 permit, whether it be an NPDES permit or a state waste
14 discharge permit, and also has different regulatory and
15 administrative requirements come on line like the
16 expiration of an NPDES permit.

17 The unit supervisor works along with that
18 facility manager to ensure that work deadlines are
19 being met and that they'll do and manage peer review of
20 a draft permit and ensure that public notice, you know,
21 necessary public notice requirements are being met.
22 And then that's all to prepare it for the actual
23 issuance of that permit by the section manager. But
24 the unit supervisor is a first-line supervisor.

25 Q. And what does that mean, first-line?

1 A. Correct. It's now the -- because right now,
2 or we have recently reorganized the section because of
3 growth in the section, and now that unit is the
4 industrial permit and stormwater unit. And that's to
5 reflect some additional engineering review
6 responsibilities that they've taken on. And that we
7 also have another unit group which will assist that
8 industrial permit unit on enforcement activities.

9 Q. And which unit is that?

10 A. And that's called the compliance and
11 technical assistance unit. But that's a change that
12 went into effect in September of 2001.

13 Q. And in what sense is that a new change? Is
14 that a new unit or is that a new role for a unit that's
15 been around for awhile?

16 A. It's a new unit.

17 Q. So prior to -- before September 2001, all of
18 those permit functions were performed by the industrial
19 permit unit?

20 A. Correct, if it was a permit assigned to the
21 industrial permit unit.

22 Q. And just to confirm, the NPDES permit for
23 Sea-Tac International Airport is assigned to the
24 industrial permit unit?

25 A. Correct.

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1 Q. Let's talk about your role in the recent 401
2 certification process. Could you please tell me when
3 you first got involved in that process?

4 A. My recollection is that I first became
5 involved I believe in late 1999, in September of 1999.

6 Q. And at that time what was your level of
7 involvement?

8 A. I became involved because we had -- Lisa
9 Austin had left the agency. She previously had been
10 the one who was serving as the water quality expert to
11 the 401 water quality certification team. And with
12 Lisa's departure and, you know, being Lisa's former
13 supervisor, those responsibilities then fell to me.

14 Q. Who else was on that 401 certification team
15 at the time?

16 A. The other folks at that time that I recall
17 who were on it were Tom Luster from our headquarters
18 office with the shoreline and environmental assistance
19 program, Ray Hellwig as the regional director.

20 Q. And that's in the Northwest regional office?

21 A. At the Northwest regional office. When I
22 started I think those were the folks who made up that
23 team.

24 Q. So just the three of you?

25 A. Right. That's my recollection of what it was

1 decisions for which you had particular responsibility
2 in your water quality role?

3 A. The portion of the water quality
4 certification that had the greatest amount of review
5 and input from water quality program and water quality
6 section are the portions of the certification that deal
7 with clean fill criteria or what I believe is described
8 as -- I'm sorry, it's described as conditions for
9 acceptance of fill to be used in construction of the
10 third runway.

11 Q. And that would be Section E, beginning on
12 Page 14 of the amended certification?

13 A. Yes. And then the other section of that
14 water quality program I had some review and input on
15 was -- I'm trying to find the portions of this that
16 deal with stormwater impacts. I'm sorry. And that
17 would be Section J, operational stormwater
18 requirements.

19 Q. That's Section J on Page 25?

20 A. Yes, 25 of 33 in the September 21, 2001
21 document.

22 Q. Were you personally involved in the water
23 quality program's work on those sections?

24 A. I was personally involved, and then as well
25 as involved with an engineer in our section, John

1 in September '99.

2 Q. Did you write any part of the 401
3 certification?

4 A. No.

5 Q. And is that answer equally valid for the
6 August 10, 2001 certification and the amended
7 September 21, 2001 certification?

8 A. Correct. Now, you're referring to the --
9 okay, the August 2001 and then the amendments; correct?

10 Q. Yes.

11 A. And my role in that was to review proposed
12 language, and as I recall, Ann Kenny was the primary
13 author of those documents, and as she would come up
14 with draft language, she would ask for corrections.
15 So I guess technically you might say that I did write
16 part of it because, you know, I would propose -- you
17 know, I would make editing changes or suggest different
18 language for her when it was going through its draft
19 revisions.

20 Q. In the case it's convenient, I think it will
21 be before we're finished here today, I'll introduce two
22 exhibits. Exhibit 1 is the amended September 21, 2001
23 version of the 401 certification, and Exhibit 2 is the
24 August 10, 2001 certification.

25 Are there any parts of the certification

1 Drabek, and also in working with an engineering
2 consultant from King County who was working for
3 Department of Ecology particularly on stormwater
4 requirements, and that's Kelly Whiting.

5 Q. How about the conditions for mitigation of
6 low flow impacts in Section I which begins on Page 22?
7 Was water quality involved in that section?

8 A. Water quality had some involvement with that,
9 but my recollection is that on much of this for the
10 mitigation of low flow impacts, we were relying on
11 modeling expertise and input from our consultant from
12 King County, and that again is Kelly Whiting.

13 Q. And when you say "we" were relying, do you
14 mean the water quality program or --

15 A. No, I mean the Department of Ecology.

16 Q. The Department generally.

17 What do you understand the purpose of the 401
18 certification to be?

19 A. Well, my understanding of any 401
20 certification is that it is certifying that a project
21 and impacts from that project will comply with the
22 state's water quality laws and regulations. Hence,
23 they're called 401 certifications, because that's the
24 portion of the Clean Water Act that it comes from, that
25 speaks to the state's having to issue one of these

1 certifications in the federal permit. And the federal
2 permit involved in this case is the 404 permit from the
3 Corps of Engineers.

4 Q. Is part of that compliance objective assuring
5 compliance with the state water quality standards?

6 A. That's part of it, yes.

7 Q. And which water quality standards apply to
8 the Seattle-Tacoma International Airport?

9 A. Well, we have both our state surface water
10 standards which are in Washington Administrative Code
11 173-201A, and our groundwater standards which are
12 Washington Administrative Code 173-200.

13 Q. You'll see that Exhibit 5 is a copy of
14 Chapter 173-201A of the Washington Administrative Code.
15 Is this the section or chapter of the code that you
16 identified as applying at Sea-Tac Airport?

17 A. Yes.

18 Q. And where in this regulation do you find the
19 specific standards that Ecology certifies compliance
20 with under the 401 certification?

21 A. There's several different places where the
22 standards are articulated in this regulation. There's
23 no one particular section.

24 Q. Is Section 173-201A-030 one of the relevant
25 sections? It's on Page 477.

1 it calls for a legal conclusion.

2 A. Yeah, again, I'm not sure -- they're two
3 separate animals, okay? One is a permit which is
4 governing, and that is the NPDES permit. It is
5 governing the stormwater -- the industrial-related
6 stormwater discharges and the industrial wastewater
7 discharges from the Port of Seattle's facility, Sea-Tac
8 Airport.

9 The 401 water quality certification, as I
10 stated before, is certifying the fact, I guess, that
11 such a permit exists, you know, such a permit is
12 necessary and it does indeed exist.

13 But in terms of one ensuring compliance with
14 the other, my thinking is that they both have to stand
15 on their own in terms of ensuring that their terms and
16 conditions are being complied with. You know, they're
17 certainly related to one another, but -- and again, I'm
18 not sure I'm completely understanding this question, so
19 I'll just stop there. I don't understand this
20 question.

21 Q. (BY MR. POULIN) Would you agree that the
22 Port of Seattle's compliance with the NPDES permit does
23 not assure that the purposes of the 401 certification
24 are met?

25 A. Say that again.

1 A. Yes.

2 Q. Do you know whether the streams that flow
3 through or originate at the Sea-Tac Airport vicinity
4 are classified as Class AA or Class A?

5 A. They are classified as Class AA.

6 Q. Does that include Des Moines Creek and Miller
7 Creek and Walker Creek?

8 A. Yes.

9 Q. Is the 401 certification intended to assure
10 compliance with the NPDES permit governing Sea-Tac
11 International Airport?

12 A. I'm not sure I understand your question.
13 When you say "ensure compliance," the 401 water quality
14 certification is, at least my understanding of it, is
15 intended to determine if there is a suitable NPDES
16 permit in place, an appropriate NPDES permit in place.

17 And to answer your question as to what
18 ensures compliance with the NPDES permit is the NPDES
19 permit itself and how Department of Ecology then
20 manages that permit. We don't rely on the 401
21 certification to ensure compliance with our NPDES
22 permit.

23 Q. Does Ecology rely on the NPDES permit to
24 certify compliance in the 401 certification?

25 MR. REAVIS: I'll just object to the extent

1 Q. Sure.

2 (Reporter read back as requested.)

3 A. No.

4 Q. (BY MR. POULIN) And why not?

5 A. Because if the NPDES permit is being complied
6 with, that means that -- if the Port of Seattle is
7 complying with all the terms and conditions of its
8 NPDES permit, that tells us that Department of Ecology
9 has reasonable assurance that Port of Seattle's
10 complying with that permit.

11 Q. Do you mean to say that complying with the
12 NPDES permit guarantees compliance with water quality
13 standards?

14 A. What I mean to say is that the way that the
15 NPDES permit is structured right now is that -- and
16 this is something that we're able to do through our
17 water quality standards and through our NPDES permits
18 -- is that through a compliance schedule built into the
19 NPDES permit, we would in fact see compliance with
20 those standards, with those water quality standards.

21 Q. Does your reliance on a compliance schedule
22 indicate that the Port is not presently satisfying the
23 water quality standards?

24 A. Our reliance on a compliance schedule is a
25 recognition of reality of when you're dealing with

1 stormwater discharges.

2 Q. And is the reality that the Port is not
3 presently complying with water quality standards?

4 A. That is not my interpretation of -- in terms
5 of their stormwater discharges, it is difficult to
6 apply our standards, in particular the standards in WAC
7 173-040, to determine for a stormwater discharge
8 whether indeed that discharge is violating those
9 standards or not. And that's because the reality is is
10 that the stormwater event is a very dynamic event in
11 which you will see concentrations of some of these
12 constituents being highly variable. And so to try to
13 apply these standards to a stormwater discharge is an
14 extremely difficult process to do as opposed to trying
15 to apply these to your standard steady states
16 industrial discharge.

17 And what we have tried to do in the permit is
18 recognize the reality of that and build in what I will
19 call an adaptive management process of building toward
20 the types and numbers of stormwater best management
21 practices that would bring these stormwater discharges
22 into a level of assurance that we could be confident
23 that these standards are not being violated.

24 Q. Your reference to compliance schedule and an
25 adaptive management approach suggests to me that you're

1 A. It's the permittee's obligation to comply
2 with the permit, correct. And you're correct that it's
3 the permittee's obligation to not violate our state
4 water quality standards.

5 Q. And isn't it Ecology's obligation to ensure
6 that the permittee satisfies both --

7 A. Correct.

8 Q. -- the permit and the water quality
9 standards?

10 A. I believe we're fulfilling both of those
11 obligations the way that we presently have the permit
12 structured.

13 Q. Well, let's look at the relationship between
14 the permit and the water quality standards, focusing
15 first on the water quality criteria that you
16 identified. And before we proceed, I'd like to mention
17 that if at any time you'd like to take a break, we can
18 easily do that.

19 (Recess taken.)

20 Q. (BY MR. POULIN) It's 10:12. Let's continue.
21 Before we jump back in, let me ask that we try to avoid
22 situations when we're both speaking at the same time so
23 that the reporter can get an accurate record, and it's
24 also important that you allow me to finish a question
25 so that you know where I'm going with it. Also, I'll

1 anticipating future compliance based on the permit
2 management approach. Doesn't that indicate that you
3 don't believe there is present compliance today?

4 A. No, I don't believe that, because what we're
5 presented with right now in our standards and with the
6 technical limits that we're presented with, when it
7 comes to regulating stormwater, are pretty monumental.
8 Because what we've been presented with to regulate
9 stormwater discharges are a set of regulations that are
10 best suited to regulating a typical steady state type
11 of industrial or municipal wastewater discharge.

12 You don't have that with stormwater. It's a
13 whole different animal. And so, you know, we're out
14 there trying as best we can given the limitations of
15 where the regulations are at right now, where the
16 science is at right now, to ensure that these current
17 stormwater discharges and future stormwater discharges
18 will not adversely impact the water quality of the
19 receiving waters, in this case adversely impact the
20 receiving waters of Miller, Walker and Des Moines
21 Creeks.

22 Q. Isn't it the permittee's obligation to comply
23 with the permit requirements and the water quality
24 standards regardless of the subjective difficulty of
25 doing so?

1 try not to cut you off.

2 Am I correct to understand your testimony as
3 asserting that the Port's compliance with its NPDES
4 permit assures Ecology that discharges at Sea-Tac
5 International Airport comply with water quality
6 standards?

7 A. What it assures Ecology is that they are on a
8 compliance schedule by complying with the permit to
9 achieve compliance with these standards. And this is
10 in particular for the stormwater discharges from the
11 facility.

12 Q. I think the question fairly calls for a yes
13 or no answer. Do you feel unable to answer yes or no?

14 A. Well, you say it calls for a simple yes or no
15 answer, and I don't believe I can give you a simple yes
16 or no answer.

17 Q. Let's look at the Port's current NPDES
18 permit. This is Exhibit 3. Would you agree that
19 this --

20 (Discussion off the record.)

21 Q. (BY MR. POULIN) Is it your understanding
22 that the NPDES permit for Sea-Tac International Airpo
23 includes a compliance schedule for stormwater
24 discharges?

25 A. Correct. That is my understanding.

1 Q. And what's your understanding of how that
2 compliance schedule works?

3 A. My understanding of how the compliance
4 schedule works is -- and without having the permit in
5 front of me, my recollection is that there's a section
6 for developing stormwater limits, stormwater discharge
7 limits in the current permit. So that says to me that
8 since we're developing stormwater limits, that that's a
9 compliance schedule.

10 Q. I'm sorry, I missed the end of your answer.

11 A. That says to me that we're developing --
12 since we're developing final stormwater limits, that
13 says to me that that is a compliance schedule, a
14 compliance track, if you will, for developing final
15 stormwater effluent limits.

16 Q. Is it your understanding that the permit does
17 not presently include effluent limits for stormwater
18 discharges?

19 A. That's my understanding, yes. Well, let me
20 correct that. Could I have a copy of the permit?

21 Q. Certainly. Here's a copy of Exhibit 3.
22 Please take a moment to review it and let me know if
23 you agree this is the current enforced permit.

24 A. (Witness reviewing document). Having had a
25 chance to look at the permit fresh here, you'll notice

1 day that exceeded 15 milligrams per liter. If they
2 were, they would be out of compliance with the permit.

3 Q. Are there both -- is it your understanding
4 that there are both numeric effluent limitations and
5 narrative effluent limitations?

6 A. You can have narrative effluent limitations,
7 yes, in a permit.

8 Q. Does --

9 A. I don't see any right off the bat here.

10 Q. Does this permit include either numeric or
11 narrative effluent limitations for stormwater
12 discharges at present?

13 A. No.

14 Q. Why doesn't the permit identify the water
15 quality criteria as effluent limitations?

16 A. Why would it?

17 Q. If the permit is intended to assure
18 compliance with water quality criteria, shouldn't those
19 criteria be identified as the not to exceed limits --

20 A. But as I stated before --

21 MR. YOUNG: You need to wait until he
22 finishes his question.

23 Q. (BY MR. POULIN) In fact, I was finished.

24 A. As I stated before, the way that our
25 standards are right now, okay, and the way we are

1 that with respect to stormwater, that there are no
2 final effluent limitations listed for stormwater. And
3 instead what you have are monitoring requirements for
4 stormwater under Special Condition S2 of the permit.

5 Q. What's your understanding of what an effluent
6 limitation is?

7 A. An effluent limitation is a regulatory
8 requirement usually in a permit that is a set limit
9 that the permittee is held to. For example, you'll
10 note that they have a set of effluent limitations for
11 the industrial wastewater system for oil and grease,
12 and they have both an average monthly limitation of 8
13 milligrams per liter and a maximum daily limitation of
14 15 milligrams per liter.

15 Q. And are you referring to Permit Condition
16 S1.A on Page 8?

17 A. Yes, I am.

18 Q. So that's a numeric cap on the amount or
19 volume of discharge that can be included --

20 A. On the monitoring that they do, the
21 monitoring that they do on their industrial wastewater
22 discharge, on their final treated industrial wastewater
23 discharge cannot, on an average monthly basis, that
24 concentration could not exceed for oil and grease 8
25 milligrams per liter. And they could never have one

1 technically limited right now, it is exceedingly
2 difficult, if not impossible, to try to apply those
3 standards to a stormwater discharge.

4 That is why this permit was designed, to
5 require the Port to do the type of monitoring and to
6 provide us with the type of data where down the line
7 once the science around stormwater improved, once our
8 knowledge around how contaminants are conveyed in
9 stormwater, once our knowledge around what the actual
10 impacts of stormwater are on a receiving water, we
11 could look to the day of establishing water
12 quality-based limits for stormwater discharges.

13 Where we were at when this permit was
14 developed, and I will say where we are at even now, it
15 is an extremely difficult prospect to develop water
16 quality-based stormwater limits.

17 Q. Haven't those water quality-based limits
18 already been established in the water quality criteria?

19 A. Not for stormwater discharge, no, they have
20 not.

21 Q. Can you show me anything in WAC 173-201A that
22 says the Washington state water quality criteria, water
23 quality standards, do not apply to stormwater?

24 A. I'm saying that the methodology for
25 developing those -- and you would not find the

1 methodology here, you wouldn't find them in the
 2 standards, okay? These are either strictly narrative
 3 or numeric standards.
 4 Q. The standards exist, don't they?
 5 A. Yeah.
 6 Q. My question is, are those standards imposed
 7 under this permit? Is the legal obligation to satisfy
 8 those standards imposed on the permittee by this
 9 document, Exhibit 3?
 10 A. They're imposed in that we are -- we put into
 11 the permit a mechanism to develop water quality-based
 12 limits, and that's what's under Condition S2.
 13 Q. And that's something that will happen in the
 14 future?
 15 A. Correct.
 16 Q. It's not happening today under this permit?
 17 A. If you're asking are there water quality-
 18 based limits for stormwater in the permit right now,
 19 no, there are not.
 20 Q. For the purpose of convenience, I'd like to
 21 focus on four different water quality standards that
 22 apply to stormwater. The first is the standard for
 23 turbidity. Do you see the stormwater -- sorry.
 24 Do you see the water quality standard for
 25 turbidity in WAC 173-201A-030?

1 Is that the way you understand it?
 2 A. That's correct.
 3 Q. Does your description of how difficult water
 4 quality standards are to apply applied in the turbid-
 5 standard here?
 6 A. No, it doesn't apply to the turbidity
 7 standards. What I was referring to is the difficulty
 8 in applying the standards under 040.
 9 Q. Okay. We'll get to those in a moment.
 10 A. Okay.
 11 Q. Does the Port's current NPDES permit require
 12 the Port to satisfy the turbidity standard here in
 13 173-201A-030(1)(c)(vi)?
 14 A. I would say it does, because under Condition
 15 S13, the Port is required for their construction
 16 activities, which is where you would anticipate seeing
 17 problems with turbidity, the Port's required for these
 18 construction activities to come up with Stormwater
 19 Pollution Prevention Plans and employ all the necessary
 20 BMPs, and that would include sediment erosion controls
 21 that would bring them into compliance with the
 22 standard.
 23 Q. Is the standard identified as an effluent
 24 limitation?
 25 A. We did not put the standard in as an effluent

1 A. Yes.
 2 Q. Where do you see that standard?
 3 A. It's under 030. It's I guess Subsection
 4 (b)(vi), Turbidity should not exceed 5 NTU over
 5 background.
 6 Q. Would you agree that that section is properly
 7 designated as Section 030 (1)(c)(vi) for Class AA,
 8 extraordinary water quality criteria?
 9 A. Wouldn't that be (1)(b)(vi)? Oh, I'm sorry.
 10 Q. (1)(a) is general characteristics, (1)(b) is
 11 characteristic uses, and (1)(c) is water quality
 12 criteria? I believe you'll see there's an arrow.
 13 A. Oh, I see, okay.
 14 Q. So would you agree that (1)(c)(vi) is the
 15 right section?
 16 A. Correct.
 17 Q. And that section applies to discharges at
 18 Sea-Tac Airport?
 19 A. That section applies to -- yes, it would
 20 apply to discharges from any facility.
 21 Q. Now, this states, Turbidity shall not exceed
 22 5 NTU over background when the background turbidity is
 23 50 NTU or less. And paraphrasing, when background
 24 turbidity is more than 50 NTU, then turbidity shall not
 25 have more than a 10 percent increase.

1 limitation, no.
 2 Q. And why not?
 3 A. I don't see it included as -- I do not know.
 4 I did not write the permit.
 5 Q. Would you agree that monitoring and testing
 6 to determine compliance with the turbidity standard is
 7 a technically simple matter?
 8 A. Are you asking is it simple to do a turbidity
 9 test?
 10 Q. Yes.
 11 A. Yeah, in my opinion it is a simple thing to
 12 do a turbidity analysis test.
 13 Q. Would you agree that the requirements of
 14 Condition S13 for construction activities do not apply
 15 generally to non-construction-related stormwater
 16 discharges under this permit?
 17 A. Yeah, S13 applies to construction-related
 18 activities.
 19 Q. But not non-construction stormwater?
 20 A. S13 is particular to construction-related
 21 activities, so -- correct, S13 does not apply to the
 22 non-construction stormwater.
 23 Q. Let's look at those requirements in WAC
 24 173-201A-040, and let's focus today on the water
 25 quality criteria for copper, lead and zinc. And we can

1 look at those individually.

2 Now, you've described difficulties relating
3 to these water quality criteria. Could you please
4 explain what difficulties you are referring to?

5 A. Certainly. The difficulty in using these
6 criteria the way they're set up in our standards right
7 now -- and again -- did you want to start off with
8 copper?

9 Q. Yes.

10 A. Just to hold copper up as an example, if
11 you'll see there that copper has a couple of footnotes
12 attached to it. If you'll look under the Freshwater
13 Acute criteria, for example, you'll see that copper --
14 the acute criteria is a one-hour average concentration
15 not to be exceeded more than once every three years on
16 the average. Also it has a footnote D for the chronic
17 criteria, and that's a four-day average concentration
18 not to be exceeded more than once every three years on
19 the average.

20 Q. Now, with respect to copper, how does the
21 Department of Ecology --

22 A. I wasn't finished.

23 Q. Oh, I'm sorry.

24 A. So when you look at those footnotes, you
25 know, what that is telling you, or at least what it

1 standards, you have to approach it in a very different
2 way than the way that we've traditionally approached
3 wastewater discharges from municipal facilities or
4 industrial process wastewater discharges.

5 Q. Well, there's a lot to discuss in that
6 statement. I'd like to address many of those
7 components individually.

8 Is it your assertion that there's an
9 exception for stormwater so that stormwater discharges
10 are not subject to the obligation of meeting these
11 numeric effluent limitations?

12 A. No, that's not my assertion.

13 Q. Do you agree that all discharges in the state
14 are subject to the obligation to assure that their
15 discharges do not cause levels of toxic substances in
16 the receiving waters to rise above the levels
17 identified here in the water quality criteria?

18 A. You know, there's a lot of dischargers in the
19 state. You discharge from in front of your home every
20 day, the stormwater that comes off from your residence,
21 okay? So my particular take on this is that it's
22 Ecology's obligation to, you know, reach for what makes
23 the most sense in applying these standards to
24 stormwater. And in the case of Sea-Tac Airport, I
25 believe our permit that was originally issued back in

1 tells me is that you're dealing with a wastewater
2 stream that is coming from a source or sources that
3 have what I would describe as steady state or
4 predictable concentrations, in this case steady state
5 or predictable concentrations of copper.

6 And you would build your treatment system
7 accordingly to attempt to meet these particular -- or
8 attempt to treat that wastewater discharge in such a
9 way that statistically you could count on not exceeding
10 either the acute or chronic criteria that's described
11 here and then also footnoted in C and D here.

12 And so when you try to apply this same thing
13 to a stormwater discharge, it's not that easy -- in
14 fact, you really can't apply it to stormwater, because
15 what you see in a typical stormwater event are
16 concentrations for copper in this case fluctuating all
17 over the place. And typically what you might see is
18 perhaps in the first 15 minutes of the storm event you
19 may indeed see a higher concentration than the copper
20 acute or chronic concentrations. But then you may see
21 it actually tail off later on in a storm event to
22 virtually non-detect.

23 So, you know, what this tells me at least is
24 that we have to approach stormwater in a very different
25 way, especially when it comes to try to apply these

1 '98 is a very good first step in doing that.

2 Q. How does Ecology know whether the Port's
3 discharges cause exceedances of these water quality
4 criteria in the receiving waters?

5 A. We don't know that. That's what we're
6 working on.

7 Q. You don't know?

8 A. No. That's what we're working on.

9 Q. The Port's discharges could be causing
10 violations of these criteria and Ecology --

11 A. Or they could not.

12 Q. -- wouldn't know?

13 A. Or they could not.

14 Q. But they could be?

15 A. Could be or they could not. We don't know.
16 That's what this permit is attempting to do.

17 Q. Hasn't Ecology certified that it has
18 assurance that the water quality criteria are being
19 met?

20 A. Could you say that again, please?

21 Q. Hasn't the Department of Ecology certified
22 that the water quality standards are being met at
23 Sea-Tac International Airport?

24 A. What we have certified in the 401 water
25 quality certification is that we have reasonable

1 assurance that all our state water quality laws and
 2 regulations are being met, okay? I do not believe that
 3 we have certified that we know with absolute certainty
 4 that stormwater discharges are or are not, for that
 5 matter, exceeding these standards. But what we have
 6 done is say that we have reasonable assurance in
 7 finding that out, and in finding that out if it is
 8 indeed happening, correcting it.

9 Q. What steps has the Department taken to
 10 determine whether the water quality in the receiving
 11 waters meets these criteria in WAC 173-201A-040 for
 12 copper, lead and zinc?

13 A. Well, one of the steps is the NPDES permit,
 14 is putting this facility and all its stormwater
 15 discharges on that path to greater knowledge. And the
 16 other is -- I believe it's in the most recent water
 17 quality certification is a requirement to do a water
 18 effects ratio study or something similar to a water
 19 effects ratio study at the Port of Seattle.

20 Q. Well, we'll focus on that a bit later, but
 21 for now let's continue looking at the steps taken in
 22 the permit.

23 You focused initially in reviewing the water
 24 quality criteria for copper on the requirement of a
 25 one-hour average concentration and a four-day average

1 a steady state discharge.

2 Q. Even though it fluctuates wildly over the
 3 course of a day?

4 A. There's still far more predictable variables
 5 in that than there are in a storm event.

6 Q. What kind of sample does the water quality
 7 criteria apply to? Does it apply to a direct sample of
 8 the discharge or does it apply to a sample of the
 9 stream?

10 A. It applies to where the criteria is met or
 11 has to be met, and so I would say that if it's criteria
 12 that's being applied end of pipe then that would be the
 13 area where the sample would be taken. If it's criteria
 14 that are being applied at the edge of a mixing zone,
 15 then that's where the sample would be taken and where
 16 the criteria would need to be met.

17 Q. Where is the freshwater criteria for copper
 18 applied?

19 A. As I just stated, it depends on if it's an
 20 end of pipe water quality criteria sample. In that
 21 case you would be looking at where the discharge meets
 22 the receiving water. And if there's a described and
 23 permitted dilution zone, then you're looking at the end
 24 of the dilution zone.

25 Q. What kind of discharge is the stormwater

1 concentration. What kind of sample do you need to
 2 determine whether that one-hour average in the first
 3 instance is met?

4 A. I've got to tell you right now, I don't know.
 5 I don't know what that would take. I know what it
 6 would take at a facility where you have a steady state
 7 discharge, but I don't know what it would take for a
 8 stormwater discharge. And that's one of the things
 9 we're working on.

10 Q. Isn't it true that many different kinds of
 11 industrial facilities have discharges that are not
 12 steady state?

13 A. If they're stormwater discharges, yes, I
 14 would say that it is true, if it's an industrial
 15 facility with stormwater.

16 Q. Isn't it also true of industrial discharges?

17 A. No, because if it's a process wastewater
 18 discharge, they have control over that process and,
 19 therefore, I would consider that a fairly steady state
 20 predictable type of discharge.

21 Q. What about a facility that rinses down the
 22 shop floor once a day with a result that all the
 23 resulting pollutants are discharged in a single flush?

24 A. They still know how much water they're
 25 applying and when it's coming, so I would consider that

1 under the NPDES permit?

2 A. We don't have -- as I stated before, we don't
 3 have effluent limits for stormwater discharges. We're
 4 developing effluent limits for stormwater discharges.

5 Q. What does it mean to say that there are no
 6 effluent limits applicable to non-construction
 7 stormwater in the permit?

8 A. It means what's stated under S2.B, is that
 9 they are on a monitoring schedule.

10 Q. Is it possible for the Port of Seattle to
 11 violate this permit in any way with a non-construction
 12 stormwater discharge?

13 A. Oh, certainly. I mean, they could violate it
 14 with a discharge from their industrial wastewater
 15 system because there are limits for the water that they
 16 collect and treat in their industrial wastewater system
 17 so that they could violate those limits, be out of
 18 compliance with the permit.

19 Q. That would be a violation applicable to the
 20 industrial wastewater system?

21 A. Correct.

22 Q. How about for non-construction stormwater?

23 A. For non-construction stormwater, well, they
 24 could violate the conditions of the permit by -- they
 25 could violate this particular condition of the permit

1 and not do the required monitoring and reporting on the
2 stormwater discharges. And, you know, that goes for
3 all the parameters that are listed there under S2.

4 Q. Putting monitoring and reporting requirements
5 aside, let's consider a hypothetical for turbidity.

6 A. Okay.

7 Q. If the Port had a non-construction stormwater
8 discharge that raised the background turbidity by a
9 factor of 3, tripled the background turbidity in the
10 receiving water, would that violate this permit?

11 MR. YOUNG: I object to the extent it calls
12 for a legal conclusion.

13 Q. (BY MR. POULIN) Let me qualify the
14 hypothetical. If we assume a background NTU of 10 and
15 the Port's non-construction stormwater discharge caused
16 the turbidity in that receiving water to increase to
17 60, would that be a violation of this permit?

18 A. As I stated before, there's no effluent
19 standards for turbidity for non-construction stormwater
20 in the permit, okay? Department of Ecology is still
21 obligated, though, to ensure that our water quality
22 standards are being met exclusive of any permit. And
23 so if we had information of that, we would investigate
24 it and proceed with, you know, following our
25 investigation. We may well proceed with an enforcement

1 action on that.

2 Q. And what provision of this permit authorizes
3 Ecology to do that in the absence of an effluent limit?

4 A. There's no provision in the permit, but we do
5 have the provision in our water quality standards.
6 Again, it goes back to that there are not expressed
7 effluent limits for non-construction-related stormwater
8 discharges. But that doesn't tie Ecology's hands from
9 taking the necessary corrective action to correct that
10 hypothetical should it arise.

11 Q. But it does mean that the permit itself does
12 not require the permittee to avoid the exceedance we
13 described in the hypothetical?

14 A. Well, if you'll look -- there's a Condition
15 G6, Compliance with Other Laws and Statutes. "Nothing
16 in the permit shall be construed as excusing the
17 Permittee from compliance with any applicable federal,
18 state, or local statutes, ordinances, or regulations."

19 Q. In your review, do those applicable federal,
20 state and local statutes, ordinances or regulations
21 include the water quality criteria in 173-201A?

22 A. Yes.

23 Q. Does that answer apply equally to stormwater
24 discharges?

25 A. Yes.

1 Q. Are you familiar with the provision of the
2 Clean Water Act that states that compliance with the
3 terms of a NPDES permit is considered compliance with
4 the Act?

5 A. I'm not really familiar with that section.
6 No, I'm not well-versed in that.

7 Q. Have you heard reference to a provision
8 that's called permit shield?

9 A. You know, I just don't get in to that. I'm
10 not a lawyer.

11 Q. Fair enough.

12 A. I'm trying to get water clean.

13 Q. You previously mentioned a compliance
14 schedule. Is there a compliance schedule in the
15 permit?

16 A. Yeah, I would interpret what's under the
17 monitoring requirements, if you look at some of the
18 language under the monitoring requirements, and in
19 particular if you look at S2.C.b.

20 Q. Would that be S2.C.2.b?

21 A. Yeah, I'm sorry.

22 Q. On Page 17?

23 A. That's an example of, you know, what I would
24 consider a type of compliance schedule, that's entitled
25 Compliance Evaluation, of how we'll be using that data

1 that they generate.

2 Q. And this states that, "Monitoring will be
3 reviewed for compliance with WAC 173-201A. The
4 department will exercise its enforcement discretion in
5 the event of non-compliance with these standards."

6 A. Correct.

7 Q. Now, isn't it true that that provision,
8 S2.C.2.b, applies only to construction stormwater?

9 A. Yeah, I'm looking at that right now, and
10 that's right, that applies to construction stormwater.

11 Q. That's a provision, S2.C.2.b is a provision
12 that was just recently added by the major modification,
13 isn't that right?

14 A. Was it? I don't know.

15 MR. REAVIS: Can I ask a question here? You
16 said Page 17 a minute ago. Are you reading from which
17 exhibit now?

18 MR. POULIN: This is Page 17 of Exhibit 3.

19 MR. REAVIS: That's the major modification,
20 not the original permit; is that right?

21 MR. POULIN: This is the current modified
22 permit which includes the original permit.

23 Q. (BY MR. POULIN) If it's of help, I'll direct
24 your attention to Page 16, Provision S2.C.2, creates
25 the monitoring schedule for construction stormwater

1 discharges to Walker Creek and tributaries and Gilliam
2 Creek and tributaries. So seeing that, would you
3 agree --

4 A. Yeah, I would agree that this was part of the
5 recent modification.

6 Q. So not only does the compliance evaluation
7 provision that you've cited, S2.C.2.b, not only does
8 that not apply to non-construction stormwater, it only
9 applies to construction stormwater that occurs in
10 Walker Creek and tributaries and Gilliam Creek and
11 tributaries but not construction stormwater discharges
12 to Miller or Des Moines Creeks; would you agree?

13 A. Correct, yes.

14 Q. Now, before we move on, I want to get back to
15 your discussion of -- if I can paraphrase and hopefully
16 accurately characterize your statement -- the
17 stormwater quality criteria in Section 040 may not be
18 so appropriate for stormwater because of its
19 fluctuating nature.

20 Isn't it true that these state water quality
21 criteria are designed to protect water quality in the
22 receiving waters and to prevent degradation of
23 characteristic uses?

24 A. Of beneficial uses?

25 Q. Beneficial uses.

1 for copper is being met?

2 A. Yes. We need the hardness data from the
3 receiving water.

4 Q. And could you explain why that is?

5 A. Without getting too overly technical, you'll
6 note that for copper, like a lot of the metals for
7 freshwater and acute criteria, you're referred to
8 footnote -- at least for the acute criteria, you're
9 referred to footnote O. And you see that there's an
10 equation there in which the hardness value of the
11 receiving water is required for you to figure out the
12 exact numeric acute concentration.

13 Q. So the actual numeric criteria varies with
14 the hardness of the receiving water?

15 A. That's correct. The correlation is that as
16 hardness in the water column in the receiving water
17 increases, so too does the acute concentration
18 increase.

19 Q. Does the NPDES permit require the Port to
20 sample and report hardness in the receiving water?

21 A. In reviewing this right now, I do not see
22 where hardness of the receiving water under this
23 Condition S2.B for non-construction stormwater, I don't
24 see where that's required.

25 Q. S2.B, that's on Page 14?

1 A. Yes.

2 Q. And isn't that objective, independent of the
3 specific nature of any discharge, the goal is to make
4 sure in order to prevent harm to aquatic life and
5 environmental values, the goal is to make sure that the
6 water quality does not exceed these standards?

7 A. Yes.

8 Q. So shouldn't that concern override the
9 difficulty of fitting a square peg of stormwater
10 discharges into the round hole of compliance with water
11 quality standards?

12 A. I don't think we're in disagreement.
13 I agree. And that's what we're trying to do here. We
14 are trying to fit the square peg of stormwater into --
15 or to do the type of analysis that's required to
16 determine if stormwater discharges from the Port of
17 Seattle are or are not violating these standards. And
18 there's a lot of gaps in our knowledge right now. And
19 we're using our NPDES permit to fill in those gaps.

20 Q. Let's look at another aspect of copper
21 standard. Isn't it true that the Department of Ecology
22 needs hardness data -- scratch that question and let me
23 rephrase.

24 Does the Department of Ecology need hardness
25 data to determine whether the water quality criteria

1 A. That's correct.

2 Q. And that identifies a schedule according to
3 which the permittee shall monitor stormwater discharges
4 at four specified outfalls?

5 A. Correct.

6 Q. And then the listed parameters called TPH,
7 TSS, turbidity, also total recoverable lead, total
8 recoverable copper, total recoverable zinc?

9 A. Yes.

10 Q. But you don't see anything here that requires
11 sampling for hardness?

12 A. No.

13 Q. Doesn't that make it impossible for Ecology
14 to determine whether the discharges satisfy water
15 quality criteria?

16 A. It makes that type of analysis more difficult
17 with the absence of that information, and that is why
18 in the water quality certification we put the
19 requirement in for a study similar to a water effects
20 ratio analysis in which you would be taking and doing a
21 study of the receiving water hardness.

22 (Reporter read back as requested.)

23 Q. (BY MR. POULIN) It's not merely more
24 difficult, it's impossible, isn't it?

25 A. No, I wouldn't say it's impossible.

1 Q. How can you determine compliance with water
2 quality standards without hardness data?

3 A. Because we have other sources for hardness
4 data other than what the Port would be collecting for
5 hardness data.

6 Q. What are those sources?

7 A. There is, from other stream studies done in
8 King County, you know, studies of hardness values for
9 similar types of streams, similar streams to Miller and
10 Des Moines and Walker Creeks, depending on the season
11 that the samples were taken.

12 But I don't think I'm disagreeing with you
13 that that is a value or a monitoring requirement that
14 should be in this permit to make Ecology's job easier
15 in evaluating how these non-construction stormwater
16 discharges meet or don't meet our state water quality
17 standards.

18 MR. POULIN: That's fine, we can break. It's
19 11:21. Let's go off record.

20 (Recess taken.)

21 Q. (BY MR. POULIN) Let's go back on record,
22 it's 11:29.

23 I believe you stated that you did not write
24 the permit?

25 A. No, I did not.

1 reference to a one-hour average concentration as well
2 as footnote D and its reference to a four-day average
3 concentration.

4 Do you know whether the permit requires
5 sampling sufficient to generate one-hour average
6 concentration?

7 A. The type of sampling that is required for
8 metals is composite sampling. And the difficulty comes
9 in that, again, how in a storm event do you take
10 discreet aliquots, samples, that are giving you an
11 accurate representation of what indeed the one-hour
12 average concentration is during that period of a storm
13 or any number of storms?

14 Now, what they are sampling here or what
15 they're required to do in their sampling is at least
16 eight times a year do this type of composite sampling.
17 And I do not know if -- because I have not recently
18 reviewed their stormwater sampling reports, I do not
19 know if you could rely on the data in those reports to
20 answer the question of whether you're exceeding the
21 one-hour average, and for that matter even more,
22 whether you're -- for chronic criteria whether you're
23 exceeding the four-day average.

24 Q. Aren't there standards governing how to
25 sample a creek to generate a one-hour average?

1 Q. Do you know who did?

2 A. Lisa Austin.

3 Q. And that was back in 1997 or '98; is that
4 right?

5 A. Yeah. She would have been writing it through
6 '97 to '98.

7 Q. She was an employee under your supervision at
8 the time?

9 A. Yes.

10 Q. Who is going to be writing the new permit
11 that presumably will be issued to replace this permit
12 this year?

13 A. His name is Ed Abbasi.

14 Q. And he is the current facility manager and
15 permit manager for Sea-Tac International Airport?

16 A. Yes.

17 Q. Do you know whether the new permit will
18 include a requirement to monitor hardness?

19 A. I don't know what it will include right now.
20 I haven't seen a draft or anything of that nature. I'm
21 fairly certain that we will be addressing hardness in
22 any metals monitoring work that we do.

23 Q. Let's go back to the water quality criteria
24 in 173-201A-040. We've just looked at hardness. We
25 previously focused briefly on footnote C and its

1 A. Are there standards?

2 Q. Uh-huh.

3 A. On it?

4 Q. Yeah.

5 A. There are guidelines from EPA on how you
6 conduct stormwater sampling. Those guidelines are by a
7 number of experts in the field considered to be very
8 inadequate, especially when it comes to answering the
9 questions as to whether or not you're exceeding the
10 one-hour or four-day average concentration, and
11 inadequate and out of date, very dated guidelines.
12 Those are the only standards or guidelines that I'm
13 currently aware of that are out there right now.

14 There's a lot of work being done by -- well,
15 for example, the National Urban Stormwater Study of
16 where they're trying to develop the science further so
17 that we can get at some of these very thorny issues
18 relative to stormwater. And sampling stormwater events
19 is what I would characterize as very much a work in
20 progress and in its infancy and definitely at the
21 beginning here.

22 And we're hoping through this permit to
23 advance that science and knowledge even more, through
24 this permit and also through the water effects ratio
25 study that we're requiring as part of the water quality

1 certification.

2 Q. Well, independent of stormwater, doesn't the
3 state have some agreed-upon protocols for determining
4 what the one-hour average concentration of pollutants
5 in a creek or other surface water body is?

6 A. Yes. We have what's called reasonable
7 potential determination procedures. And again, though,
8 those reasonable potential procedures are only for what
9 I called before steady state industrial process
10 wastewater discharges or municipal wastewater
11 discharges. We have not yet come up with a method for
12 applying a reasonable potential determination to
13 stormwater.

14 Q. Well, these criteria in the WACs, they were
15 created by the Department of Ecology, weren't they?

16 A. Yes, as we're obligated to do under the Clean
17 Water Act.

18 Q. And doesn't 173-201A-040 sub 2 say the
19 Department shall employ or require chemical testing,
20 acute and chronic toxicity testing, and biological
21 assessments, as appropriate, to determine compliance?

22 A. Sure does, yes. It says that.

23 Q. Are you telling me the Department doesn't
24 know how to do that?

25 A. No, I'm not telling you that. What I am

1 Act?

2 A. No. And I'm not an attorney, but I believe
3 307(a) are the effluent standards on toxics establish
4 under effluent guidelines that are established by EPA

5 Q. And isn't 173-201A-040 addressed to toxic
6 substances as required to implement that EPA directive
7 at the state level?

8 A. I can't speak to -- I'd have to research what
9 307(a) is, but I think you may be -- I don't think what
10 is being referred to here, which I think are in fact
11 standards developed under effluent guidelines from EPA,
12 and that's what Section 307(a) of the Clean Water Act
13 is referring to, I don't think to say that those are
14 comparable to our water quality standards are the same.
15 What drives our water quality standards is actually a
16 different section of the Clean Water Act.

17 Q. Do you know which section that is?

18 A. No, I don't.

19 Q. But you would agree that this particular
20 component, 173-201A-040, is the section of Washington's
21 water quality standards that addresses toxic pollutants
22 as designated by EPA?

23 A. No, I don't agree.

24 Q. You don't agree?

25 A. No, I don't agree. I don't agree that this

1 telling you is that the science for doing the
2 appropriate level of testing is in development right
3 now. But I believe that we're employing all -- or
4 requiring of the Port all necessary chemical, acute,
5 chronic toxicity testing in this permit and in the
6 water quality certification to work on this evaluation
7 of their non-construction stormwater.

8 Q. Let's shift gears briefly here. Let's turn
9 to Page 52 of the permit, Section G11, General
10 Condition G11.

11 You can take your time to read this, but it
12 states, "If any applicable toxic effluent standard or
13 prohibition (including any schedule of compliance
14 specified in such effluent standard of prohibition) is
15 established under Section 307(a) of the Clean Water Act
16 for a toxic pollutant and that standard or prohibition
17 is more stringent than any limitation upon such
18 pollutant in the permit, the Department shall institute
19 proceedings to modify or revoke and reissue the permit
20 to conform to the new toxic effluent standard or
21 prohibition."

22 A. Uh-huh.

23 Q. Isn't WAC 173-201A, and in particular 040,
24 just such a toxic effluent standard of prohibition
25 established under Section 307(a) of the Clean Water

1 Section G11 is referring to water quality standards
2 that the state's developed. These are standards that
3 we have set for toxics in Washington state waters. And
4 without the Clean Water Act available to me, I believe
5 307(a) actually refers to effluent standards that are
6 set under EPA's -- that EPA would set under effluent
7 guidelines.

8 Q. Can you tell me what a composite sample is,
9 turning back to the sampling requirements in the permit
10 on Page 14?

11 A. (Witness reviewing document). I believe
12 composite -- and I don't see the associated fact sheet
13 here -- but it used to have a list of definitions on
14 the fact sheet.

15 Q. I have the fact sheet available here. This
16 is a new exhibit.

17 (Deposition Exhibit No. 136 was marked for
18 identification.)

19 Q. (BY MR. POULIN) Please take a look at new
20 Exhibit 136 and see if this appears to be the fact
21 sheet.

22 A. Okay. In Exhibit 136, if you look on Page
23 47, there's a definition there of what we mean by
24 composite sample.

25 Q. And it says it's "A mixture of grab samples

1 collected at the same sampling point at different
2 times, formed either by continuous sampling or by
3 mixing discreet samples. May be a 'time-composite'
4 (collected at constant time intervals) or 'flow-
5 proportional' collected either as a constant sample
6 volume at time intervals proportional to stream flow,
7 or collected by increasing the volume of each aliquot
8 as the flow increased while maintaining a constant time
9 interval between the aliquots."

10 Do you know whether this kind of composite
11 sample could be used to give you a one-hour average
12 concentration?

13 A. I don't know.

14 Q. Do you know if it could be used to give you a
15 four-day average concentration?

16 A. That would assume that you had a storm event
17 that lasted over four days.

18 Q. Who knows that kind of thing within the water
19 quality program?

20 A. I don't know who would know within the water
21 quality program. I know people who are working on this
22 within the water quality program to -- again, try to
23 advance a science here. The question comes in is,
24 especially in composite sampling on storm events,
25 whether you're answering the question better using

1 that right now.

2 Q. Is it possible that there is no answer?

3 A. It's possible, but I think that we can't
4 simply stand still and do nothing because it's not
5 possible right now to get this answer. But I think
6 it's very possible with further study, further
7 knowledge, to advance this whole issue and thereby --
8 you know, I'm optimistic that by working on these
9 things, you know, we will have an answer.

10 Q. Ecology could require the Port to collect a
11 grab sample instead of a composite sample, couldn't it?

12 A. Yes, they could, but grab sample doesn't tell
13 you anything. It doesn't tell you as much as a
14 composite sample does.

15 Q. Wouldn't a series of grab samples give you
16 the ability to determine four-hour or several one-hour
17 averages?

18 A. Now you're talking composites. A series of
19 grab samples combined is a composite sample.

20 Q. I'm not suggesting that they be combined but
21 that they be evaluated independently. Four grab
22 samples taken over the course of an hour, for example,
23 wouldn't that give you a one-hour average?

24 A. Then if you're taking the average of their
25 concentrations, you've just composited the sample.

1 time-composite or flow-proportional.

2 I do know that there is debate among the
3 sampling experts, the stormwater experts in the field,
4 that you most likely get a more accurate
5 characterization of just what the concentrations are in
6 a storm event if you were to use flow-proportional,
7 that that better gauges what the impact is. But then
8 that leads to a difficulty as to, you know, what is
9 really the associated time to your flow-proportional
10 sample and then whether that time then correlates with
11 something that you would see in the receiving water,
12 and again, the receiving water being where we're trying
13 to measure whether these impacts are occurring or not,
14 whether you can get all of those things to line up.

15 Again, this points to just how difficult and
16 complex true characterization of the impact of the
17 stormwater discharge, characterization of those
18 stormwater events can be on the receiving water.

19 Q. Is it possible that no one in Ecology knows
20 the answer to my question whether the composite sample
21 can be used to determine one-hour average or four-day
22 average for purposes of compliance with water quality
23 criteria for metals?

24 A. I think it's possible, yeah. I think it's
25 possible that you're -- that there's no one who knows

1 Q. Well, isn't that what the water quality
2 standard calls for, a one-hour average concentration?

3 A. Correct.

4 Q. So does that suggest to you, then, that a
5 composite may be adequate if it's a composite of a
6 one-hour time period?

7 A. It's a composite -- no, no.

8 Q. Okay, let's look at a different issue. The
9 monitoring requirements for non-construction stormwater
10 require the permittee, that is the Port, to monitor for
11 total recoverable copper, lead and zinc.

12 What does that mean, total recoverable?

13 A. Total recoverable is a measure of all the
14 metals that -- whether a dissolved or particulate, all
15 the metals -- or the -- let me back up.

16 Total recoverable is a measure of the entire
17 concentration of a metal regardless of the species of
18 that metal, whether it be dissolved or associated with
19 a particulate.

20 Q. Do you see that in the water quality criteria
21 Section 173-201A-040 that in the first column, both
22 copper, lead and zinc and other relevant metals are
23 followed by the footnote DD?

24 A. Yes, I do.

25 Q. Let's look at footnote DD. And for your

65

1 convenience, I have a new exhibit which you will see is
2 simply an enlarged photocopy of footnote DD.

3 (Deposition Exhibit No. 137 was marked for
4 identification.)

5 Q. (BY MR. POULIN) Could you please read the
6 first sentence of footnote DD aloud.

7 A. First sentence?

8 Q. Yes.

9 A. "These ambient criteria in the table are for
10 the dissolved fraction."

11 Q. And did you just explain that the total
12 recoverable is a whole that includes subparts?

13 A. It includes the dissolved fraction.

14 Q. So the dissolved fraction is just part of the
15 total recoverable?

16 A. Correct.

17 Q. Have you reviewed this footnote before?

18 A. Yes, I've had occasion to review this
19 footnote before.

20 Q. Let's focus on the third and fourth sentences
21 of the footnote. Those sentences state, "The metals
22 criteria may not be used to calculate total recoverable
23 effluent limits unless the seasonal partitioning of the
24 dissolved to total metals in the ambient water are
25 known. When this information is absent, these metals

1 Q. Would you agree then that the metals
2 criteria, since Ecology doesn't know the seasonal
3 partitioning, shall be applied as total recoverable
4 values instead of being applied as the dissolved
5 fraction?

6 A. Well, there's more to that sentence there.
7 "Determined by back-calculation, using the conversion
8 factors incorporated in the criterion equations."

9 Q. Okay. So are the criterion equations the
10 items we see in footnote O and, for example, P, and for
11 lead, Q and R, and for zinc, AA and BB? Are those the
12 criterion equations?

13 A. Yes, those are examples of criterion
14 equations.

15 Q. And do you understand the reference to back-
16 calculation to mean using this equation --

17 A. Yes.

18 Q. -- to identify the numeric criteria?

19 A. Yes.

20 Q. And do you understand this fourth sentence to
21 mean that because the Department does not know seasonal
22 partitioning of the dissolved metals, it should use the
23 total recoverable metal value rather than the dissolved
24 fraction?

25 A. Yes.

66

1 criteria shall be applied as total recoverable values,
2 determined by back-calculation, using the conversion
3 factors incorporated in the criterion equations."

4 A. Yes.

5 Q. What does that language mean to you, or what
6 do you understand it to mean?

7 A. I understand it to mean what it says.

8 Q. Does Ecology know the seasonal partitioning
9 of the dissolved to total metals in Miller and
10 Des Moines Creek?

11 A. No, we do not.

12 Q. Do you understand the phrase, this
13 information in the fourth sentence of footnote DD to
14 refer to the seasonal partitioning of the dissolved to
15 total metals in the ambient water?

16 A. Could you repeat that, please?

17 Q. Do you understand the phrase, this
18 information in the fourth sentence of footnote DD to
19 refer to the seasonal partitioning of the dissolved to
20 total metals in the ambient water?

21 A. Yes, I do.

22 Q. Would you agree that then in the meaning of
23 footnote DD, that information is absent because Ecology
24 doesn't know it?

25 A. Yes.

1 Q. So would you agree, then, that at least
2 insofar as our focus on footnote DD, the sampling
3 requirement in the permit for total recoverable copper,
4 lead and zinc, is sufficient to generate information
5 that we can use to determine the water quality criteria
6 with that back-calculation process?

7 A. That's if you're developing an effluent
8 limit.

9 Q. Or if you're determining compliance with the
10 standard?

11 A. Or if you're determining compliance with the
12 standard, yes.

13 Q. Because DD explains how to use the equation
14 to determine what the numeric criteria is?

15 A. Yes.

16 Q. So in summary, would you agree that footnote
17 DD can be understood to mean that you do not have to
18 know the dissolved fraction of the specific metal to
19 determine the applicable water quality criteria when
20 the seasonal partitioning of the dissolved to total
21 metals in the ambient water is not known?

22 A. That's what we're left with, yes.

23 Could I add something, please?

24 Q. Sure.

25 A. If you'll read the entire paragraph there,

1 going on from the fourth sentence, "Metals criteria may
2 be adjusted on a site-specific basis when data are made
3 available to the Department clearly demonstrating the
4 effective use of the water effects ratio approach
5 established by USEPA, as generally guided by the
6 procedures in USEPA Water Quality Standards Handbook,
7 December 1983, as supplemented." And that has been
8 supplemented and replaced since 1983.

9 Q. Have data been made available to the
10 Department in the sense of that sentence? Has the
11 water effects ratio approach established by USEPA and
12 as supplemented since 1983, has that taken place?

13 A. We have put requirements in the permit, in
14 the NPDES permit, and also in the water quality
15 certification to develop that information.

16 Q. We'll focus more on the 401 later, but where
17 is that relevant section or provision of the NPDES
18 permit?

19 A. Well, in my opinion, we are filling in that
20 data gap with the monitoring requirements under S2.B in
21 part. It's not perfect, but I think it gets us part of
22 the way there.

23 Q. Didn't you agree that S2.B doesn't even
24 require hardness sampling?

25 A. Sure, I agreed with you on that, but that

1 Do you understand that language to require
2 sampling of the receiving water?

3 A. Yes.

4 Q. Why is that?

5 A. Because they are taking the -- well, let me
6 back up on that. It's sampling of their acute toxicity
7 effects from the stormwater at the end of pipe, so it
8 would be just before it enters the receiving water.

9 Q. It's characterization of the effluent, not of
10 the receiving water, isn't that right?

11 A. That's correct. But what this effluent
12 characterization helps us to answer is whether or not
13 we'll see any acute toxicity effects in the receiving
14 water. If we're not seeing any acute toxicity in the
15 stormwater, in the stormwater effluent, then we would
16 not anticipate seeing any acute toxicity impacts in the
17 receiving water.

18 Q. But it doesn't necessarily tell you whether
19 water quality standards are being met in the receiving
20 water, does it?

21 A. Well, it tells us that one of the standards
22 is being met, and that's a narrative standard for acute
23 toxicity.

24 Q. But it doesn't tell you whether the numeric
25 criteria for the metals are being met?

1 doesn't say it's not telling us anything else.

2 Q. If Ecology wants to determine whether these
3 water quality criteria are being met in the receiving
4 water, shouldn't the permittee be required to sample
5 the receiving water in addition to the discharge?

6 A. Correct.

7 Q. Does this permit require the Port to sample
8 the receiving water?

9 A. This condition in the permit does not require
10 that, no.

11 Q. Is there some other provision in the permit
12 that requires sampling of the receiving water for this
13 purpose?

14 A. That requires a receiving water study?
15 Yeah, we have other provisions in here, in particular,
16 the acute toxicity conditions under S10, acute toxicity
17 for stormwater. And some of the information generated
18 there helps tell us what's happening in the receiving
19 water, especially as it relates to acute toxicity
20 effects from stormwater discharges.

21 Q. That Provision S10 on Page 34 identifies two
22 acute toxicity tests listed below and says at the
23 outset that effluent characterization for acute
24 toxicity shall be conducted twice at each of the
25 following outfalls, and then identifies four outfalls.

1 A. No, it doesn't give us that type of
2 definition.

3 Q. There's a reference here at the bottom of
4 Page 35 to Department of Ecology publication
5 WQ-R-90-80, Laboratory Guidance and Whole Effluent
6 Toxicity Test Review Criteria. And it says that all
7 samples and test solutions for toxicity testing shall
8 have water quality measurements as specified in that
9 publication.

10 Do you know whether that publication requires
11 sampling of hardness or receiving water
12 characteristics?

13 A. I believe it requires sampling of the
14 hardness of the whole effluent.

15 Q. And in your understanding of Section 040 --
16 MR. YOUNG: Is it time to take a lunch break?
17 MR. POULIN: Oh, sure, we can break now, if
18 you'd like.

19 (Discussion off the record.)

20 MR. POULIN: It's 12:15. Let's break.
21 (Deposition recessed at 12:15, to be
22 reconvened at 1:00.)
23
24
25

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AFTERNOON SESSION

1:00 P.M.

--oOo--

CONTINUING EXAMINATION

BY MR. POULIN:

Q. It's 1:06. Let's recap one or two matters. Before we get in to that, have you ever done a site visit at the Seattle-Tacoma International Airport?

A. Yes.

Q. How many times have you done site visits?

A. I'd have to say over the years, six to eight times.

Q. Six to eight times?

A. Uh-huh.

Q. Let's say in the past two years, how many site visits?

A. In the past two years, I believe it's been three times.

Q. What were the circumstances of those visits?

A. I believe the circumstance of one of the visits was to show our deputy director the types of sediment erosion control facilities that the Port of Seattle had in place for some of their construction activities.

A. We have to check in with Port personnel and be accompanied onto the secure areas of the facility.

Q. So did they identify -- verify your identification, make sure you were Kevin Fitzpatrick? Is that one of the things?

A. Yes.

Q. And did you have an escort from the Port throughout your visit?

A. Yeah. There's certain areas of the Port where escort's required, certain parts of the facility where an escort's required.

Q. And how did it work -- how did you move about the facility physically? Did you use your own vehicles or did the Port provide a vehicle?

A. It's been different on different occasions. At times we have followed in our own vehicle.

Q. Followed the Port?

A. Yeah. And at other times we've gone in a Port vehicle for convenience.

Q. What was the group size that you had? Well, I guess you said you had six to eight different visits. What was the largest entourage or group you ever did a site visit with?

A. Are you referring to the number from Department of Ecology?

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The other was to follow up on a complaint that we had received about one of the construction activities. I think the other was to follow up on a concern that a citizen had. Brett Fish was the citizen who had a concern about what he was observing as presporum mortalities in Miller Creek. And so while I was visiting with him, I also did a drive-by inspection of some of the construction activities at the Port of Seattle.

Q. Where were those construction activities or which construction sites did you visit?

A. The construction sites that we visited for -- the most recent visit with our deputy director were in and around the developing embankment area and also in and around the interchange construction on State Route 509.

Q. Has the Port ever placed any restrictions on your access to any part of the airport grounds or facility?

A. The only restrictions we have is because of the security nature that the Port has, but we've never been denied access to areas that we wanted to have access to.

Q. What were those security conditions that you recall?

Q. The total number of people present.

A. Both Port personnel and Ecology personnel?

Q. Yes.

A. And I should say, and Port consultants?

Q. Yes.

A. The largest number I can recall is all total, I think there were about ten of us.

Q. And excluding Port and its personnel and consultants, what was the largest group of non-Port people that you did a site visit with?

A. What do you mean by non-Port people?

Q. Everyone other than Port staff employees or consultants.

A. Are you referring to the largest number of Ecology personnel?

Q. Well, you could tell me the largest number of Ecology personnel. I would also be interested to hear Ecology plus. If you had other people with you that were not Ecology people, I'd like to get their numbers.

A. Well, I guess exclusive of Ecology personnel -- I'm sorry, if you're talking about the largest group of Ecology personnel, I think including myself that would number about four.

Q. And if you expanded that to include people that were not Ecology?

1 A. I don't ever recall being on an inspection
2 where we had folks from other agencies other than Port
3 of Seattle or Port of Seattle and its consultants. I
4 just don't recall right now.

5 Q. Did you ever do a site visit with King County
6 personnel?

7 A. Well, I'm including in that group King County
8 personnel because the King County person who was along
9 with us -- I should say one of the King County persons
10 was not under contract to Ecology, so I guess that
11 would be one King County person.

12 When I was talking about Ecology personnel
13 before, and here I'm referring specifically to Kelly
14 Whiting because Kelly was under contract to Department
15 of Ecology, I considered him Ecology personnel even
16 though he works for King County.

17 Q. So on the site visit when Kelly Whiting
18 accompanied you, there were no more than four non-Port
19 people, as you recall?

20 A. As I recall.

21 Q. Did the Port ever place any restrictions on
22 where you could go?

23 A. No.

24 Q. Did they require any background checks?

25 A. They required that we submit our ID and then,

1 Fitzsimmons?

2 A. Yes.

3 Q. And what prompted her visit?

4 A. She was on a visit of a number of different
5 sites in the Northwest region, and she expressed an
6 interest in, since she was brand new to the agency,
7 of -- and we thought it would be of interest to her
8 since she was brand new to the agency, to see the Port
9 of Seattle Sea-Tac Airport facility.

10 Q. Has Director Fitzsimmons done a site visit?

11 A. I don't know.

12 Q. To your knowledge, when did stormwater
13 discharges become subject to the Clean Water Act?

14 A. That's funny, because we just talked about
15 that at lunchtime. Stormwater discharges --

16 MR. YOUNG: Move to strike the privilege that
17 you just referred to.

18 Q. (BY MR. POULIN) Without divulging any
19 privileged attorney-client information, do you remember
20 when Ecology started to focus on stormwater, if that
21 would be helpful?

22 A. Stormwater became an increasing concern --
23 and this is from my perspective now. Stormwater from
24 industrial facilities became an increasing concern I
25 believe starting with the shipyards, and that would be

1 you know, when we -- especially when we were in secure
2 areas of the airport, we had to have the necessary
3 badges to show that we were being accompanied by Port
4 personnel into those areas.

5 Q. Did the Port require the Department to
6 identify in advance where it would be going?

7 A. No.

8 Q. And did it require Ecology to identify in
9 advance who would be among the Ecology group?

10 A. No, I don't recall doing that in advance, you
11 know. They may have asked what number of people are
12 coming from Ecology so that they could make vehicle
13 arrangements, but I don't recall where we had to
14 identify them by name who was coming.

15 Q. Who is the deputy director that you
16 mentioned?

17 A. Linda Hoffman.

18 Q. And what's she a deputy director of?

19 A. She's deputy director of the Department of
20 Ecology.

21 Q. How many deputy directors does Ecology have?

22 A. One.

23 Q. Just one?

24 A. Yeah.

25 Q. So she's an assistant to Director

1 back in the mid to late '80s.

2 Q. Would you agree that Sea-Tac International
3 Airport is considered an industrial facility?

4 A. Yes. That's why we put it under permit.
5 In fact, I was the person at Ecology who first raised
6 the concerns about whether we were adequately
7 addressing stormwater runoff at Sea-Tac Airport. And
8 that goes back to '91/92.

9 Q. So ten years ago you raised that issue?

10 A. Yes.

11 Q. When did stormwater discharges become subject
12 to the requirement of complying with water quality
13 standards?

14 A. When did stormwater discharges? I'm not sure
15 I understand your question.

16 Q. Well, you would agree at one point stormwater
17 discharges were not regulated under the Clean Water
18 Act; is that right?

19 A. I believe it was always the intent to somehow
20 regulate the impacts of stormwater, you know, in the
21 Clean Water Act. I mean, the goal of the Clean Water
22 Act is to protect and restore the beneficial uses of
23 our nation's waters, the fishable/swimmable. And I
24 believe what was included in that is even to look at
25 the impacts that come from stormwater, whether it be

1 municipal stormwater sources or industrial stormwater
 2 sources.
 3 And so towards that end, EPA developed their
 4 stormwater regulations which I believe were first
 5 promulgated back in -- I don't recall exactly, I
 6 believe in the early '90s. And so following in that,
 7 we wanted to ensure that we were in step with those
 8 regulations, especially with regard to industrial
 9 stormwater discharges. But I would say that Ecology as
 10 an agency may have even been ahead of EPA in that we
 11 were looking at stormwater concerns at shipyards dating
 12 back to the mid '80s.
 13 Q. Do shipyards have particular issues with
 14 metals in their stormwater discharges?
 15 A. Yes, they do, because of the nature of their
 16 industrial processes and because much of their work on
 17 vessels, whether in dry-docks or out in their yards,
 18 are exposed to weather. And because of one particular
 19 type of industrial operation that they use which is
 20 blasting with -- sandblasting, aggregate blasting
 21 operations, and if they use a particular type of
 22 blasting agent that has high copper concentrations in
 23 it. So you put all those together and you get into
 24 some really serious stormwater runoff concerns and
 25 source control concerns.

1 our knowledge on the character of the stormwater
 2 discharges from the Port of Seattle and what the
 3 impacts of those stormwater discharges are to the
 4 surrounding receiving waters, and with that increased
 5 knowledge, how best then to regulate those stormwater
 6 discharges given that, you know, what we require right
 7 now is currently the best available science that we
 8 have, the types of best management practices that they
 9 should be putting into effect for treating those
 10 stormwater discharges.
 11 But again, I don't see the relationship
 12 between the fact that, you know, we started working on
 13 stormwater discharges at shipyards back in the mid
 14 '80s, that we then were presented with a whole set of
 15 new regulations from Environmental Protection Agency on
 16 stormwater and how to manage stormwater.
 17 If you'll look at those regulations, those
 18 regulations don't speak at all to regulating stormwater
 19 discharges with NPDES permits outside of issuing
 20 general NPDES permits for industrial stormwater
 21 discharges. And I think we've gone quite a bit further
 22 than that by having an individual permit on Sea-Tac
 23 Airport for their industrial stormwater discharges.
 24 So I actually think we've done a commendable,
 25 if not excellent job in controlling those discharges

1 (Recess taken.)
 2 Q. (BY MR. POULIN) Back on at 1:28.
 3 As something of a layman or at least a newcomer, it
 4 seems amazing to me that 15 years after these shipyard
 5 issues first arose and ten years after you say the
 6 stormwater concerns at Sea-Tac were first raised,
 7 Ecology still isn't requiring something as basic as
 8 hardness sampling in the NPDES permit.
 9 How can that be?
 10 A. Well, it doesn't strike me as amazing at all.
 11 And I don't see how the fact that EPA first promulgated
 12 its first regulations on stormwater, what relationship
 13 that has to do with whether or not we're putting
 14 hardness monitoring requirements in the Sea-Tac permit.
 15 I'm sorry, I just don't see the relation.
 16 Q. Well, didn't you agree earlier that the
 17 Department of Ecology has the obligation to ensure
 18 compliance with water quality standards?
 19 A. Yes.
 20 Q. And didn't you agree that with respect to the
 21 metals that we've looked at today, you can't determine
 22 whether a discharge of the receiving water is meeting
 23 water quality standards without hardness data?
 24 A. Yes, I will agree with that, but I also
 25 stated that this is all part of an effort to increase

1 and working for further controls on those discharges
 2 from Sea-Tac Airport.
 3 Q. Isn't it true that there are two kinds of
 4 effluent limitations, generally speaking; there's
 5 technology-based effluent limitations and surface water
 6 quality-based effluent limitations?
 7 A. Yes.
 8 Q. If you look at Exhibit 136 which is the fact
 9 sheet for the Port's permit, you'll see a discussion of
 10 both kinds of effluent limitations; technology-based
 11 effluent limitations beginning on Page 20, and water
 12 quality-based effluent limitations beginning on
 13 Page 22.
 14 Isn't it true that the water quality criteria
 15 and specifically the numeric limits on metals
 16 concentrations identified in WAC 173-201A-040
 17 constitute surface water quality-based effluent
 18 limitations?
 19 A. They go to how you develop those surface
 20 water quality-based effluent limitations. They're
 21 not -- they are not the surface water quality effluent
 22 limitations. You use those standards to develop water
 23 quality-based effluent limitations.
 24 Q. And isn't it true that the effluent
 25 limitations that are developed in that process must be

1 designed to ensure that the surface water criteria in
2 WAC 173-201A-040 are not exceeded?

3 **A.** If you develop effluent limitations, that's
4 the purpose of developing those effluent limitations.
5 Water quality-based effluent limitations are derived to
6 ensure that those standards are not violated.

7 **Q.** You've already agreed that the Port's NPDES
8 permit does not include any effluent limitations on
9 non-construction stormwater, isn't that right?

10 **A.** That's correct.

11 **Q.** And you've also stated that Ecology does not
12 know whether the receiving waters for the Port's
13 non-construction stormwater discharges meet the state
14 water quality criteria or not?

15 **A.** We don't know if they're meeting them or if
16 they're not meeting them, correct, but we're working to
17 find out.

18 **Q.** And you, I believe, agreed that you can't
19 know without hardness criteria -- sorry, without
20 hardness data from the receiving waters?

21 **A.** I'm saying that it is more difficult without
22 current hardness data on those receiving waters to
23 determine whether a stormwater discharge is impacting
24 the receiving water in such a way that it's exceeding
25 the criteria. But that is one of the reasons why, to

1 ratio study?

2 **A.** The purpose -- if you'll turn to Exhibit 137,
3 part of the purpose of this study is to calculate
4 seasonal partitioning of dissolved to total metals in
5 the ambient waters. That would be one of the purposes
6 of that study.

7 The other purpose of the study, and what I
8 should say, this study includes a water effects ratio
9 study, but it also is intended to evaluate or to help
10 us fill in data gaps that we have as to what the water
11 quality impacts of non-construction-related stormwater
12 discharges are to the surrounding receiving waters of
13 Miller, Walker and Des Moines Creeks.

14 **Q.** Isn't it true that the purpose of the WERS
15 study is to change the site-specific water quality
16 criteria applicable to metals in the receiving waters
17 at Sea-Tac International Airport?

18 **A.** No, I wouldn't characterize it that way.
19 I would say that the purpose of any water effects ratio
20 study is to determine how to apply our acute and
21 chronic criteria, especially for metals, at the site.

22 **Q.** I deposed a water quality specialist from
23 King County yesterday, and she told me that King County
24 simply requires permittees to sample the dissolved
25 fraction of metals. Why doesn't Ecology do that?

1 fill in that data gap, we put into the water quality
2 certification the requirements for a water effect ratio
3 study.

4 **Q.** Why doesn't Ecology simply require hardness
5 sampling in the permit?

6 **A.** Because when we issued the permit it wasn't
7 in there, so we're correcting that now by putting it in
8 the water quality certification.

9 **Q.** Ecology can modify the permit any time it
10 wants to, can't it?

11 **A.** That's true.

12 **Q.** And Ecology has an obligation to do so if
13 necessary to protect water quality, does it not?

14 **A.** And there's a number of avenues available to
15 Ecology to get that data, and the avenue that we chose
16 to take to get that data is through the water quality
17 certification requirement for a water effects ratio
18 study.

19 **Q.** Isn't the avenue that Ecology chose to wait
20 until the next permit cycle?

21 **A.** No. I just told you that we have the
22 requirement for a water effects ratio study in the
23 water quality certification which would get us this
24 hardness data.

25 **Q.** What is the purpose of the water effects

1 **A.** I don't know.

2 **Q.** Isn't it true that Ecology does not want to
3 know whether the Port's discharges comply with water
4 quality standards?

5 **A.** No. That is categorically no.

6 **Q.** Wouldn't it be easy to find out simply by
7 sampling dissolved fractions of metals and hardness in
8 the receiving water?

9 **A.** And that's what the water effects ratio study
10 requires them to do.

11 **Q.** You don't need a water effects ratio to get
12 that information, do you?

13 **A.** You need it in its totality to answer a lot
14 of other questions.

15 **Q.** But not these questions? For over ten years
16 Ecology has avoided requiring the Port to sample
17 hardness in the receiving waters --

18 **MR. YOUNG:** Object. Argumentative.

19 **Q.** (BY MR. POULIN) -- isn't that true?

20 **A.** I'm sorry, what's your -- the point you're
21 trying to make is really lost on me.

22 **Q.** If Ecology really wanted to know if water
23 quality standards in the receiving waters at Sea-Tac
24 International Airport were being exceeded, wouldn't it
25 be much easier to require the Port to measure the

1 dissolved fraction of metals and hardness in the
2 receiving water instead of embarking on a complex WERS
3 study that's not needed?

4 **A.** Well, I don't agree with your
5 characterization of this at all. Ecology does want to
6 know and has made honest and forthright inquiry of what
7 the actual impacts of stormwater is from the Port of
8 Seattle facility. And I take great offense that you're
9 implying that somehow Ecology wants to keep itself in
10 the dark. That is 180 out from the way I know Ecology
11 goes about its business.

12 **MR. POULIN:** I'd like to introduce a new
13 exhibit.

14 (Deposition Exhibit No. 138 was marked for
15 identification.)

16 **Q.** (BY MR. POULIN) Exhibit 138 is a copy of a
17 certified letter that the Citizens Against Sea-Tac
18 Expansion organization sent to the Port of Seattle and
19 Director Fitzsimmons of Washington Department of
20 Ecology as well as relevant personnel in the regional
21 and national offices of EPA stating their notice of
22 intent to file suit for violations of toxic water
23 quality criteria for copper, lead and zinc, dated
24 September 7, 2000. And the exhibit also includes a
25 cover letter to Raymond Hellwig, director of Ecology's

1 letter, Exhibit 138 identifies 75 distinct violations
2 of water quality standards documented in the Port's
3 1999 Annual Stormwater Monitoring Report alone, and
4 that's based on sampled and reported metals
5 concentrations with contemporaneous hardness
6 information.

7 **MR. REAVIS:** I guess the document speaks for
8 itself. I'm not sure there was a question in there
9 anyway.

10 **MR. POULIN:** There hasn't been yet.

11 **Q.** (BY MR. POULIN) Can you tell me what action
12 you took when provided a copy of this letter during
13 your tenure as the facility manager of Sea-Tac?

14 **A.** I'm not sure that this letter -- this was a
15 notice of intent to sue that was filed against the Port
16 of Seattle, and I fail to see how that -- because this
17 is a third party -- or notice of intent of a third
18 party to take a Clean Water Act citizen suit against
19 the Port of Seattle, I'm unclear as to how that is
20 supposed to compel me to take some action on that.
21 In fact, you know, we are instructed not to interfere
22 with third party lawsuit actions.

23 **Q.** Did the Department -- did you consider taking
24 any enforcement action against the Port using your
25 authority under state and federal law?

1 Northwest regional office, and Tom Luster, then in the
2 permit coordination unit of Ecology.

3 Have you seen any part of this exhibit
4 before?

5 **A.** I think I have, yes.

6 **Q.** Could you please describe the circumstances
7 in which you saw this exhibit?

8 **A.** I believe I saw a carbon copy of the notice
9 of intent to file suit under the Clean Water Act,
10 carbon copy of the notice that was given to Port of
11 Seattle.

12 **Q.** I believe you testified earlier that at the
13 time, you were the unit supervisor of industrial permit
14 unit in the Northwest regional office; is that right?

15 **A.** At the time of this letter?

16 **Q.** Yes.

17 **A.** Of this notice of intent to file suit?

18 **Q.** Yes.

19 **A.** Yes, in September of 2000 I was a supervisor
20 in the industrial permit unit.

21 **Q.** And were you also the facility manager at
22 Sea-Tac at the time, Sea-Tac International Airport?

23 **A.** I believe I was filling in as the facility
24 manager then too.

25 **Q.** As described in the cover letter, the notice

1 **A.** Consider when? Because I mean, we've
2 considered and taken enforcement action against the
3 Port of Seattle on a number of occasions.

4 **Q.** I'm referring to enforcement action
5 addressing the violations identified or alleged in this
6 letter.

7 **A.** Yes, we did look at the information provided
8 in this letter. I think it also prompted me to go back
9 and review the permit and their annual water quality
10 monitoring reports and also to review actions that the
11 Port of Seattle had taken in working on the data that
12 they were developing in the stormwater monitoring
13 reports and to determine if some type of compliance or
14 enforcement action is warranted. I think I did
15 consider that at the time.

16 **Q.** And what was the result of that review?

17 **A.** As I recall, my thought processes at the time
18 were that the type of source control efforts that the
19 Port was going through and the types of actions that
20 they were taking to track down sources of these metals
21 in their stormwater, and in particular sources of zinc,
22 and then the control measures that they were putting
23 place to control those sources of zinc into their
24 stormwater discharges I felt was the type of
25 responsible -- or the type of response that we were

1 looking for from the Port. That is, that as their
2 monitoring data would show a problem in a particular
3 stormwater drainage, they then put investigation into
4 effect at the Port to determine where these sources
5 were at and then take measures to, where possible,
6 control those sources.

7 And the particular instance I remember is
8 that they were using their stormwater monitoring
9 results to track down, and track down rather
10 effectively, I believe, a zinc -- a roof on a building
11 on the north end of the airport. And then they
12 moved -- and this is my evaluation -- I thought they
13 moved rather expeditiously to control that source.

14 Q. What have they done to control that source of
15 zinc from rooftops?

16 A. My recollection is that they are going to put
17 some inert coating on that roof so that you don't have
18 the metals/zinc runoff into that. I'm not the permit
19 manager right now so I don't know if that's actually
20 been put into effect.

21 Q. Well, you just described the Port's actions
22 as rather expeditious. Do you know whether it's taken
23 place yet?

24 A. Expeditious in terms of tracking down the
25 source.

1 sources of where it's originating from. It could be
2 from aircraft tires, it could be -- copper is such a
3 ubiquitous metal that sometimes its anybody's guess as
4 to where it could be coming from. It could be actual
5 air deposition.

6 Q. Isn't it known that the non-construction
7 stormwater runoff from the runways includes elevated
8 levels of copper?

9 A. Yeah, they have levels of copper that are
10 similar to what you find in other urban stormwater
11 sources. And if you look at the data from other urban
12 stormwater sources, the levels of copper is actually
13 lower from the runway runoff than it would be for
14 runoff from a city street.

15 Q. Isn't it true that the levels of copper in
16 the runway area of runoff at Sea-Tac are higher than
17 the levels of copper in other stormwater runoff areas
18 at Sea-Tac that don't include runway runoff?

19 A. I don't know. I'd have to go back and look
20 at the data.

21 Q. What's the source of lead in the stormwater
22 runoff at Sea-Tac?

23 A. I don't know. In all earnest, I'd be curious
24 if you knew what the source of lead is.

25 Q. Well, if I understood the sense of your

1 Q. But not expeditious in terms of implementing
2 a fix?

3 A. I don't know if they've implemented the
4 recommended source control measures to finally
5 eliminate it as a source.

6 Q. You don't know the schedule they've proposed
7 to retrofit the roof or the coating?

8 A. I don't know.

9 Q. What actions have they taken to address the
10 copper?

11 A. Well, some of the actions that they've
12 proposed to address the copper, where they've been able
13 to find a source problem with the copper, and if it's a
14 source that can't be easily ameliorated like they could
15 with the zinc roof, then their proposal is to route
16 those type of drainages into their wastewater
17 industrial treatment system.

18 In the case where they can't effect adequate
19 source control, they propose in their stormwater
20 management plan to upgrade treatment, stormwater
21 treatment being used for those areas.

22 Q. Isn't it true that one source of copper in
23 stormwater runoff at Sea-Tac is the runways?

24 A. That's a source area. But where that copper
25 is originating from, it could be a number of different

1 previous response, you seemed satisfied with the source
2 control efforts that the Port has suggested to address
3 these metal concentrations. And if you don't know
4 where the lead comes from, I'm wondering how you could
5 be satisfied with their proposal to address the
6 problem.

7 A. Well, is lead a problem?

8 Q. Well, this Exhibit 138 identifies 21
9 violations of Washington's acute and chronic water
10 quality criteria for lead on Page 3 of the notice of
11 intent to sue. And that's from three different storm
12 drains at Sea-Tac Airport.

13 A. (Witness reviewing document). Well, my
14 recollection at the time is what I was really focusing
15 in on were the continual problems we were seeing with
16 copper and zinc, and I have not thought as hard on
17 lead.

18 And I think one of the things that may be
19 slightly flawed in this analysis that was done, what's
20 being reported back here is the total recoverable lead
21 discharge. And I don't believe that that -- and I
22 could be wrong, but I don't believe that that takes
23 into account the translator for lead which would tell
24 you what the actual dissolved portion of that total
25 recoverable lead value is.

1 Q. Isn't that another footnote DD issue?
 2 A. Yeah, footnote DD gets in to that.
 3 Q. That's Exhibit 137?
 4 A. Uh-huh.
 5 Q. Didn't you agree earlier that the total
 6 recoverable value is acceptable and useful under the
 7 criteria when seasonal partitioning data is not known?
 8 A. Yeah, but again, it goes with the whole
 9 sentence there that you're determining that value
 10 through using conversion factors incorporated in the
 11 criterion equations. So for lead, there's a -- when
 12 you have the total recoverable value of lead measured,
 13 you're then putting a translator to that, and then
 14 that's what you compare to the actual criterion. Just
 15 looking at this again after a couple of years, it looks
 16 like that might not have been done here.
 17 Q. Are you retracting your previous agreement
 18 that footnote DD allows you to use total recoverable
 19 metals in the conversion factor?
 20 MR. YOUNG: I object. It mischaracterizes
 21 the previous testimony.
 22 A. No.
 23 MR. YOUNG: Go ahead.
 24 A. No, that's not what I'm saying. What I'm
 25 saying is if you again read that whole sentence, "When

1 And it doesn't say that that -- it's not
 2 expressed in there that then those values were further
 3 back-calculated using the conversion factor from our
 4 standards. It appears to me as if this column was
 5 generated just using the raw data that was reported out
 6 of the Annual Stormwater Monitoring Report which were
 7 simply the total recoverable values.
 8 Q. Isn't it true that the conversion factor
 9 identified in footnotes Q and R in WAC 173-201A-040 is
 10 a factor that's applied to adjust the applicable
 11 numeric criteria, not the sample value?
 12 A. You put the translator in front of that total
 13 recoverable value -- okay. I don't want to get into
 14 it. Do we have to get into a technical discussion?
 15 MR. YOUNG: You have to answer his question.
 16 A. I'm sorry, I'm --
 17 Q. (BY MR. POULIN) Yeah. In other words, you
 18 don't use the sample data in determining what the
 19 criteria is under footnote Q or R, do you?
 20 A. Okay, you're right, I'm wrong.
 21 Q. So that basis you identified for discrediting
 22 the apparent lead violations reported here is mistaken?
 23 A. I'm mistaken.
 24 Q. Did you take this issue up with the Port?
 25 A. What issue?

1 this information is absent, these metals criteria shall
 2 be applied as total recoverable values, determined by
 3 back-calculation, using the conversion factors
 4 incorporated in the criterion equations." And one of
 5 the conversion factors that enters into this, and it
 6 appears that it was not applied to this column on total
 7 recoverable lead, the column marked Total Recoverable
 8 Lead Discharge, is that it doesn't appear to me as
 9 though that conversion factor was applied to those
 10 total recoverable lead values.
 11 Q. Why do you say that?
 12 A. Because it appears that --
 13 Q. And let me clarify. You're referring to the
 14 far right-hand or sixth column of information on Page 3
 15 of the notice of intent to sue in Exhibit 138?
 16 A. Yes.
 17 Q. Why do you assert that the conversion factor
 18 was not correctly applied in generating those values?
 19 A. Because I'm just going on the information
 20 presented, and the column is headed TR, which I assume
 21 is for total recoverable, lead discharge. And there's
 22 footnotes on there of 1 and 4, 1 being from 1999 Annual
 23 Stormwater Monitoring Report, Appendix B and Appendix
 24 D; and then footnote 4, values stated in micrograms per
 25 liter.

1 Q. The issue of the alleged ongoing and
 2 continuing violations of water quality standards for
 3 copper, lead and zinc as identified in this notice of
 4 intent to sue. Did you ever say, Hey, we've got a
 5 problem, we've got to get to the bottom of this?
 6 A. Yes, on a number of occasions. And again, at
 7 the time that I was the facility manager for the Port
 8 or acting as the facility manager of the Port, I was
 9 aware of what was coming through on their Annual
 10 Stormwater Monitoring Reports, and I was satisfied with
 11 the steps that the Port was taking to address and solve
 12 those problems for these -- especially for two
 13 particular metals, for copper and zinc, in those
 14 discharges.
 15 Q. I'm confused. You said you didn't know what
 16 the source of the copper was.
 17 A. No, I don't think I said I didn't know what
 18 the source of the copper was. I suspected that one of
 19 the sources of copper was probably in the --
 20 Q. Aircraft tires?
 21 A. Aircraft tire.
 22 Q. Well, let's look briefly at the permit fact
 23 sheet, Exhibit 136, on Page 27.
 24 A. What was the page again?
 25 Q. Page 26, I meant to say. But before we focus

1 on that, this fact sheet is as old as the permit
 2 itself, isn't that right? In other words, the fact
 3 sheet came out in 1998?
 4 **A.** Correct, along with the permit.
 5 **Q.** And in the discussion of the Stormwater
 6 Receiving Environment Monitoring Report, the fact sheet
 7 discusses the June 1997 report --
 8 **A.** That was required by the previous permit.
 9 **Q.** Yes, and states right up front in the second
 10 sentence, "The study found that concentrations of total
 11 recoverable copper in ambient waters both upstream and
 12 downstream of the stormwater discharges generally
 13 exceeded the water quality criteria."
 14 **A.** Uh-huh.
 15 **Q.** Boom, right there. So the water quality
 16 criteria for copper is not being met in the receiving
 17 water, and Ecology acknowledges that four years ago
 18 based on information it had five years ago.
 19 **A.** Uh-huh, yes.
 20 **Q.** And you've just stated that you believe one
 21 of the sources of copper is aircraft tires that work
 22 their way into the stormwater; is that right?
 23 **A.** Right, as they take off and touch down on the
 24 runway.
 25 **Q.** And the Port has proposed to build another

1 related stormwater discharges.
 2 **Q.** And this iterative process involves permits
 3 that last for five years. How many permit cycles do
 4 you anticipate it will take to impose effluent limits
 5 that are sufficient to achieve compliance with water
 6 quality standards?
 7 **A.** Well, I believe our standards actually allow
 8 us to put a facility on a 12-year compliance schedule.
 9 I'm hoping that we're able to do it in less time than
 10 that.
 11 **Q.** And that's 12 years starting when?
 12 **A.** That would be 12 years starting when we put
 13 on what we know to be final stormwater effluent limits.
 14 **Q.** So it could be as much as 12 years from a
 15 date that hasn't even happened yet?
 16 **A.** That's my understanding, yes.
 17 **Q.** What's your understanding of the limit on how
 18 much time Ecology has to impose effluent limits?
 19 **A.** For stormwater?
 20 **Q.** Yes.
 21 **A.** The only thing that we're required to do for
 22 stormwater right now, at least from EPA, the only thing
 23 we're required to do for stormwater right now is to put
 24 BMPs on those. So we're I think considerably ahead of
 25 the game here in that for at least moving towards

1 runway which will have more aircraft landing and
 2 depositing aircraft tire rubber on new impervious
 3 surface and resulting in additional copper-tainted
 4 stormwater runoff.
 5 **A.** But the Port has also proposed to continue to
 6 put in all necessary treatment BMPs since it's highly
 7 unlikely that they can adequately control that source,
 8 that particular source, that is, aircraft tires. But
 9 that they would in their stormwater management plan for
 10 the facility move to put in the necessary treatment
 11 BMPs to control for that copper runoff, to treat for
 12 that copper runoff.
 13 **Q.** Not only is it in their stormwater management
 14 plan, but that is the intent behind our permit as well,
 15 is I'll go back to a statement I made earlier, is that
 16 with stormwater treatment controls, the permit drives
 17 adaptive management on stormwater treatment.
 18 **Q.** And you think the permit is effective in
 19 doing so without any other effluent limits on
 20 non-construction stormwater?
 21 **A.** The idea of the permit is it's an iterative
 22 process, and I didn't say that it's effective in doing
 23 it without effluent limits for stormwater. This permit
 24 and then subsequent permits will build towards setting
 25 stormwater effluent limits for their non-construction-

1 putting water quality-based limits, through the
 2 information that we're gathering, we're at least moving
 3 towards putting water quality-based limits into effect
 4 for this facility.
 5 **Q.** Let me see if I understand you. Despite
 6 known exceedances of state water quality criteria for
 7 copper that are identified in the fact sheet, your
 8 understanding is that Ecology is under no obligation to
 9 impose any effluent limits on copper stormwater runoff
 10 and that requiring BMPs is good enough?
 11 **A.** No, I'm saying that EPA says it's good enough
 12 to require BMPs. Ecology is actually moving ahead to
 13 say, we think it takes more than BMPs to truly address
 14 the impacts, the water quality impacts of stormwater
 15 discharges. That's why we're trying to logically and
 16 intelligently move ahead to put stormwater effluent
 17 limits, stormwater water quality-based effluent limits
 18 into effect for this facility as well as a number of
 19 other industrial facilities where stormwater's a
 20 problem.
 21 **Q.** What happened to Ecology's obligation to set
 22 permit limitations and conditions as necessary to avoid
 23 violations of water quality standards now, not 12 years
 24 from now or 12 years from some future date?
 25 **A.** Well, we're fulfilling that obligation by

1 putting in the type of requirements that moves us
2 towards that level of compliance. One cannot simply
3 turn a switch or say, okay, here are the effluent
4 limits, make it happen, and just by doing that have it
5 be so. I mean, that is not dealing in reality.

6 The reality is is that you have a facility
7 that discharges large amounts of stormwater, large
8 amounts of stormwater that are receiving some
9 treatment, but we're finding that in some cases it's
10 not receiving all the necessary treatment. And so what
11 we have to do, if we're going to do anything at all and
12 not simply fold our tents up and go away, is build a
13 system that further expands our knowledge of what is
14 the characteristics and what are the impacts of these
15 stormwater discharges, and then further, how we can put
16 the sort of source control changes into effect, how we
17 can maximize all our treatment BMPs at this facility,
18 and then to see if we even need to go further in
19 developing some innovative best management practices
20 treatment BMPs to really solve the water quality
21 problem that we're confronted with.

22 MR. POULIN: I'd like to introduce a new
23 exhibit, but before we do that, let's take a break.

24 (Recess taken.)

25 Q. (BY MR. POULIN) Let's go back on the record,

1 And the trend that I've seen, and I'm going
2 to put the caveat on this that this is not any formal
3 type of analysis that I've done but this is a very
4 thumbnail type of trend analysis, that the trend tha.
5 have seen is that from the Port's Annual Stormwater
6 Monitoring Reports is that over the years, the trend
7 that I'm seeing is an improvement in the water quality
8 of their stormwater discharges. And again, I want that
9 understood that there's a fair number of qualifiers on
10 that.

11 Q. You've just said that the monitoring you
12 require the Port to do tells you something, but it
13 doesn't tell you the information necessary to determine
14 compliance, isn't that true?

15 A. Compliance with what?

16 Q. With the state water quality standards for
17 dissolved metals.

18 A. It helps us look at part of that picture.
19 And I will grant you that by not having the hardness
20 data on the receiving water submitted along with the
21 stormwater sampling that they're doing, that it leaves
22 that picture incomplete. But nevertheless, it does
23 tell us something as to what the characteristics of
24 that stormwater are and through the reporting that they
25 do in their Annual Stormwater Monitoring Reports, we

1 it's 2:35.

2 Mr. Fitzpatrick, you've testified that you
3 were satisfied that the source control efforts and
4 other actions that the Port has taken -- well, you're
5 satisfied with their approach.

6 I'd like to ask, if you don't know whether
7 the Port's discharges or the conditions in the
8 receiving waters comply with water quality standards
9 and you're not presently requiring the sampling and
10 monitoring necessary to determine such compliance, how
11 can you know whether things are getting better or will
12 get better?

13 A. I think part of your question, which was a
14 multi-part question, you said that we don't require
15 monitoring to determine if things are getting better,
16 and I would disagree with that. We do require
17 monitoring.

18 Q. My question is intended to refer to the kinds
19 of monitoring we discussed earlier, monitoring of
20 hardness, monitoring of instream quality.

21 A. Well, the types of monitoring we do require
22 does tell us something about the characteristics of
23 their stormwater discharges, and we can tell from that
24 monitoring whether that water quality is getting better
25 or if it's getting worse.

1 can tell if things are getting better or things are
2 getting worse. Now, there's a lot more that we need to
3 learn.

4 Q. Before we look at one of those Annual
5 Stormwater Monitoring Reports, let's look at the permit
6 requirement that requires the Port to generate an
7 Annual Stormwater Monitoring Report. It appears to me
8 that that's addressed in Permit condition S2.E. Please
9 tell me if you agree. That would be Page 17 of 52 in
10 Exhibit 3.

11 A. Yes, I'd agree.

12 Q. Let me ask your understanding as the former
13 permit manager and current section head for water
14 quality, under the first sentence of Permit Condition
15 S2.E, is the Port supposed to report a summary of the
16 results of both construction and non-construction
17 stormwater?

18 A. (Witness reading document). Are you talking
19 in the Annual Stormwater Monitoring Summary Report?

20 Q. Yes.

21 A. What they're supposed to report there is
22 monitoring that was done under S2.B which is -- S2.P
23 monitoring requirements for non-construction
24 stormwater, or S3.E -- and it needs to include I
25 believe S3.E.

1 Q. And isn't it true that Permit Condition S3.E
2 requires the recording of results for each measurement
3 or sample taken, a requirement that embraces both
4 construction and non-construction stormwater?

5 A. Well, S3.E applies to all samples taken by
6 the Port, yeah.

7 Q. So then shouldn't their Annual Stormwater
8 Monitoring Summary include a summary of all stormwater
9 samples taken, not just the non-construction?

10 A. I would take it that they, at least in that
11 summary, be providing everything that's included there
12 under S3.E.

13 Q. Would you agree that that includes
14 construction stormwater samples?

15 A. Yeah, I'd agree. Yes, I'd agree.

16 Q. So the annual summary report generated to
17 satisfy Permit Condition S2.E should include all
18 stormwater sampling whether construction or
19 non-construction?

20 A. Now that I read this over again, I would have
21 to -- (Witness reading document.) Yeah, because it
22 says "stormwater monitoring conducted pursuant to
23 Special Condition S2.B or S3.E," and S3.E does apply to
24 all measurements taken. So I would think that would
25 include stormwater monitoring done at construction

1 sites as well.

2 Q. Now, what happens to these reports when
3 they're submitted? First off, who are they submitted
4 to?

5 A. They're submitted to the permit manager for
6 review, and I believe they also copy -- these Annual
7 Stormwater Monitoring Reports, they put a copy of those
8 into the Burien Public Library for ease of public
9 access.

10 Q. Is this the kind of report that Ecology has
11 to approve or sign off on?

12 A. No, there's no approval required on this
13 report.

14 (Deposition Exhibit No. 139 was marked for
15 identification.)

16 Q. (BY MR. POULIN) Exhibit 139 is a copy of the
17 Annual Stormwater Monitoring Report for Seattle-Tacoma
18 International Airport for the period July 1, 1998
19 through June 30, 1999, has a date of September 1999 on
20 it.

21 Have you previously reviewed this 1999 Annual
22 Stormwater Monitoring Report?

23 A. I believe I reviewed it soon after I came in.
24 That would be over, what is it now, two years ago.

25 Q. Am I correct to read Page 6 of the permit as

1 indicating that this report would have been submitted
2 on October 1, 1999?

3 A. Yeah, it has to be submitted by October 1st.
4 That's probably why it's dated September '99.

5 Q. That was right about the time when you took
6 over as the permit manager?

7 A. Just right about then, yeah.

8 Q. At the outset, would you agree that this
9 Annual Stormwater Summary Report only summarizes
10 non-construction stormwater sampling?

11 A. No, I don't think I'd agree with that,
12 because they have another section in here, 4.7, Other
13 Results, which includes WET samples, non-representative
14 composites, field quality control samples, and then
15 also there's a section on outfall constructions.

16 So without having opportunity to review this
17 again in detail, you know, I wouldn't know whether I
18 could agree or disagree with you as to whether or not
19 there's results from construction activity included in
20 here.

21 Q. Looking briefly at Pages 29, 30, 31, do you
22 see any indication that these other results include
23 sampling of construction discharges?

24 A. (Witness reviewing document). Well, just
25 with my quick review of those pages that you point out

1 to me, I don't see under that Section 4.7, which is
2 entitled Other Results, anything referring to samples
3 from construction-related stormwater.

4 Q. Let's turn to Page 29 where there's a
5 discussion of WET testing, whole effluent toxicity.

6 A. Okay.

7 Q. It says in the second paragraph there under
8 4.7.1 that "WET testing bioassays used the two required
9 aquatic test species: Daphnia pulex" -- well,
10 paraphrasing, a waterflea, and the fathead minnow.

11 Who or what requires the use of those two
12 species, do you know?

13 A. I think you'd have to turn back to the NPDES
14 permit and the whole effluent toxicity testing, S10.

15 Q. Yes.

16 A. And it says there --

17 Q. I see here, Page 35 apparently answers the
18 questions on provision -- seems to kind of revert from
19 S10 to S9.

20 A. That's a typo in there.

21 Q. Appears to be a pagination error --

22 A. Yeah.

23 Q. -- of some sort.

24 A. Yeah, it's a heading error. It should
25 actually read S10, Acute Toxicity - Stormwater

1 (Continued). But you look under there, it says, "Acute
2 toxicity tests shall be conducted with the following
3 species and protocols," so.

4 Q. The reason I ask, in yesterday's deposition,
5 the King County water quality specialist stated that
6 she thought it somewhat curious that the fathead minnow
7 was used rather than a salmonid. Do you know why that
8 fathead minnow was selected?

9 A. I don't, I don't.

10 Q. Now, in this report, back to Page 29 in the
11 1999 report, it states, "Results from outfall SDN1
12 exhibited toxicity that appears to be attributable to
13 metals leaching from uncoated galvanized metal
14 rooftops. The Port is currently verifying the source
15 of toxicity so that this problem can be rectified in a
16 timely manner."

17 Now, isn't it true that SDN1 is a code that
18 designates a known outfall with a known drainage basin?

19 A. Yes. I believe it refers to stormwater
20 outfall, north stormwater -- or drainage basin on the
21 north part of the airport.

22 Q. And this report is over two years old, isn't
23 that right?

24 A. Yes.

25 Q. Let's introduce or take a look at a

1 MR. REAVIS: Did that last question say "as
2 of the year 2000"?

3 A. Actually, this is more of the year 2001,
4 wouldn't it be?

5 Q. (BY MR. POULIN) Well, my reference is to the
6 two reports mentioned in the parenthetical POS 2000b
7 and Tobiason and Logan 2000.

8 Do you know if either of those reports was
9 previously submitted to the Department?

10 A. I don't know. The references -- I don't know
11 because it's unclear to me what these references are.
12 If I had a better idea of what the references are, I
13 might be able to tell you.

14 Q. Now, the discussion in the next three
15 paragraphs refers in a couple of places to the
16 apparently high costs of reroofing or painting,
17 paraphrasing.

18 A. Could I have it established, this is the
19 first time I've seen this report. This report was
20 submitted to Ecology in September 2001. At that time I
21 was no longer the facility manager for the Port of
22 Seattle, so you're catching me at a cold start here.

23 Q. The question I wanted to ask is, given the
24 discussion here of the cost effectiveness of various
25 options, I wanted to have you explain your

1 previously introduced exhibit that's Exhibit No. 6.
2 I haven't given you a copy yet. If you look to Page
3 37 -- back that up. If you look to the bottom of Page
4 36 in this 2001 Annual Stormwater Monitoring Report
5 from Sea-Tac, the discussion two years later states
6 that, "Zinc associated with runoff from galvanized" --

7 A. I'm sorry. I'm just trying to establish the
8 times here. Okay, go ahead.

9 Q. Yeah, the Exhibit 139 is the 1999 report and
10 Exhibit 6 is the similar report two years later,
11 September 2001, which states on Page 36, "Zinc
12 associated with runoff from galvanized roofing
13 materials appears to affect only outfall SDN1. Unlike
14 SDE4, where several metal-roofed cargo buildings make
15 up a few percent of the total impervious area in the
16 subbasin, three similar cargo buildings comprise nearly
17 30 percent of the total impervious area drained by SDN1
18 (at the sampling station)." And skipping a sentence
19 then states, "Source-tracing indicated that the SDN1
20 toxicity was attributable to zinc."

21 So it sounds like the source of that zinc
22 problem has been identified as of last September or as
23 of the date of the year 2000 reports identified there,
24 would you agree?

25 A. Correct.

1 understanding of the extent to which cost is a factor
2 when Ecology decides what proposals are acceptable to
3 address known pollution problems.

4 A. Well, our standard under RCW 9048 is all
5 known available and reasonable treatment. And
6 "reasonable" does consider cost, it does factor in.

7 Q. And could you please explain to me how
8 that AKART, that so-called AKART of standard applies,
9 how it's used?

10 A. Well, this would be something that is done by
11 the facility manager, that the facility manager would
12 do what we call an AKART analysis. And they would look
13 at the available -- you know, the literature that's
14 available out there to see what type of remedies have
15 been brought to bear in the past for these types of
16 pollution control issues.

17 And, for example, if they were to find
18 through a review of the literature that reroofing or
19 recoating the rooftop is a generally accepted practice,
20 they would most likely require the Port to put that
21 remedy in place, unless the Port could demonstrate that
22 their alternative here of putting a treatment media
23 place effects the same level of control.

24 Q. Let's look at this 1999 annual reports
25 discussion of the metals in stormwater. If you look at

1 the discussion beginning on Page 22, first paragraph
2 states that, "All data reported below are for total
3 recoverable metals." And the first sentence of the
4 second paragraph explains that "The Washington water
5 quality standards for copper, lead and zinc are based
6 on the dissolved fraction of the metal."

7 A. Yes.

8 Q. Now, isn't it true that the same laboratories
9 that evaluate samples to determine total recoverable
10 metals could determine the dissolved fraction?

11 A. Yes. In most cases, yes.

12 Q. And all that would require would be a change
13 in their instructions to do so?

14 A. Well, it would require a change in the way
15 the sampling is done.

16 Q. How so?

17 A. Because in testing for dissolved metals, you
18 have to filter the sample to do a test for dissolved
19 metals. You're filtering through only the dissolved
20 species of the metal.

21 Q. Would that involve a change in the way the
22 sample is taken or a change in the way the sample is
23 processed?

24 A. It's a change in the way the sample's taken.
25 At least that's my understanding. The sampling

1 A. I'm not sure I understand your question.

2 Q. Well, this Section S2.G that you've
3 identified seems to suggest that there are several
4 sources of standards that could be used. I'm wondering
5 if you know which one is used. Is it the CFR
6 guidelines, is it the APHA guidelines, is it something
7 else?

8 A. I don't know and I wouldn't want to guess.
9 I'd have to go back and ask the current facility
10 manager to research that. In most cases, though,
11 people are following the sampling and analytical
12 methods prescribed in standard methods.

13 Q. We talked about whole effluent toxicity
14 testing. Is that something that the Port is required
15 to do on an annual basis under this permit?

16 A. Well, there's both acute and chronic whole
17 effluent toxicity testing that they do both on their
18 industrial wastewater discharge and on their stormwater
19 discharges. And if you're -- is your question
20 referring to stormwater?

21 Q. Yes, with reference to stormwater.

22 A. With reference to stormwater, in this permit
23 they were required to do the effluent characterization
24 for acute toxicity. And I believe for this permit that
25 effluent characterization was required once based on

1 procedure for dissolved metals is different from the
2 sampling procedures for total recoverable.

3 Q. If I remember correctly, you were uncertain
4 earlier as to where the permit dictates the required
5 procedures for sampling; is that right? Or do you know
6 where they are specified?

7 A. I think they're specified in the monitoring
8 portion of the permit. In S2, there's Sampling and
9 Analytical Procedures.

10 Q. That's on Page 18?

11 A. Page 18, right. If you look at the second
12 paragraph there, "Sampling and analytical methods used
13 to meet the water and wastewater monitoring
14 requirements specified in this permit shall conform to
15 the latest revision of the Guidelines Establishing Test
16 Procedures for the Analysis of Pollutants contained in
17 the 40 CFR Part 136."

18 Q. Do you know whether -- to finish that
19 sentence, it says, "or to the latest version of
20 Standard Methods for Examination of Water and
21 Wastewater," skipping a bit, "unless otherwise
22 specified in this permit or approved in writing by the
23 Department."

24 Do you know which procedures are approved at
25 present?

1 two acute toxicity tests. And it was toxicity tests
2 done on composite stormwater samples from outfalls 002,
3 005, 006, and 011.

4 Q. Now, I note those four outfalls do not
5 include -- do not appear to include SDN1, the outfall
6 with the zinc problem; is that right?

7 A. I wouldn't know whether subbasin SDN1 is
8 tributary to those outfalls.

9 Q. If you'll look to page -- for example, if
10 you'll look to Page 119 of Exhibit 139, it's a
11 spreadsheet very near to the end of the exhibit, you
12 will see that in the last full column to the right of
13 this spreadsheet, which is identified as SDE4 Source
14 Tracing in Multiple Upstream Manholes, the Port is
15 actually reporting here hardness data.

16 A. Yes.

17 Q. And if you turn to the page back to SDE4 --
18 I'm sorry, if you turn the page back to the previous
19 page, 118, you'll see that there towards the center
20 there's some hardness information reported in the
21 column to the left of PH.

22 A. Yes.

23 Q. Turning to, for example, Pages 113, 115, 114
24 as you like, you will see these spreadsheets, which
25 towards the right report sampling results for copper,

1 leads and zinc do not include hardness, in contrast
2 with that first page we looked at, 119, which includes
3 hardness data but no results for copper, lead and zinc.
4 In that respect 119 is the same as 118.

5 I'd like to know if you're aware that
6 following Citizens Against Sea-Tac Expansion's use of
7 the 1999 Annual Stormwater Monitoring Report, Exhibit
8 139, to correlate copper, lead and zinc data with the
9 hardness reported in the annual report, the Port of
10 Seattle stopped including hardness data in its annual
11 report?

12 A. I'm not aware of that.

13 Q. In your understanding of the permit
14 requirements that obligate the Port to generate an
15 annual report summarizing the results of its stormwater
16 sampling including, as stated in Permit Condition S3.E,
17 the results of all analyses, are you aware of any
18 authority that would allow the Port to withhold
19 hardness data from the annual report?

20 A. They could not withhold hardness data from
21 that. If they were doing the sampling, if they were
22 taking the samples for hardness, it's my understanding
23 that they would have to include it as part of their
24 annual report.

25 Q. So if we assume that the Port is complying

1 with its obligations, does its failure to report any
2 hardness data suggest that it has stopped monitoring or
3 sampling hardness data?

4 A. If they're complying with their obligations,
5 if they're meeting the obligations of their NPDES
6 permit, I would draw the conclusion that they have
7 stopped taking hardness samples and running analysis
8 for hardness.

9 Q. And would you agree that they're able to do
10 so without violating the permit because the permit does
11 not require them to sample or report hardness?

12 A. The permit does not require them to sample or
13 report hardness.

14 MR. POULIN: It's 3:32. I'd like to take a
15 brief break, if we could.

16 (Recess taken.)

17 Q. (BY MR. POULIN) It's 3:37.

18 Before we move on from the Annual Stormwater
19 Monitoring Report, the Port's discussion of metals
20 focuses heavily on comparisons of the water quality in
21 the Port's discharges from Sea-Tac Airport with other
22 places rather than comparing its own water quality with
23 state water quality standards.

24 Is that approach acceptable to the
25 Department?

1 A. What pages are you referring to?

2 Q. Well, as an example, I would refer you to
3 Page 14 of the 1999 report that's Exhibit 139.

4 A. Page 14?

5 Q. Yes.

6 A. Well, to make the comparison between the
7 water quality of their stormwater runoff to that from
8 other stormwater studies I think is a comparison that
9 they are welcome to make. I mean, it's advancing
10 information, advancing knowledge of what you see in
11 other stormwater sources, other stormwater sources from
12 City of Bellevue in this case, from studies done by
13 Metro in the Seattle area, and then also what's come
14 out of national studies like under the column of NURP.

15 Q. Well, perhaps these questions should be
16 directed to the Port and perhaps they will be, but
17 looking at Table 4, that table doesn't even include
18 Sea-Tac's discharges, does it?

19 A. No.

20 Q. Doesn't this compare everybody but Sea-Tac?

21 A. That's correct. I'm taking it for what
22 they're calling it, stormwater quality comparators.
23 And I take it as it was authored is, here's some
24 information for Ecology to consider on what other
25 stormwater studies have shown. I guess what I'm saying

1 is I'm taking it at its face value. I'm not trying to
2 read anything into it, any intent into it.

3 Q. What do you make of this footnote (f) on
4 Table 4?

5 A. What page again, please?

6 Q. This is Page 14, Table 4. In discussing the
7 Washington state standard and the far right-hand
8 column, the table actually generates a state standard
9 for copper, lead and zinc but attaches a footnote (f)
10 which says, "Total recoverable metals. Washington
11 state acute standards expressed as total recoverable,
12 calculated at 28 micrograms per liter of hardness using
13 Ecology's 'TSDCALC6.XLW' spreadsheet."

14 A. Uh-huh.

15 Q. Does Ecology have a program that identifies
16 the applicable water quality standard at different
17 hardness values?

18 A. Yes. And I believe at the time that they did
19 this report in 1999, the version of that program was a
20 TSDCALC6.XLW spreadsheet.

21 Q. Now, it just strikes me as odd when the Port
22 has a demonstrated ability to create a nice summary
23 table including easy-to-compare information and
24 juxtaposes that with the Washington state standard,
25 they omit the relevant information from Sea-Tac from

1 that table, and any effort to derive that information
2 from this report requires a great deal of scratching
3 and digging through the text of the discussion in all
4 manner of different parts of the report.

5 MR. YOUNG: I object to the form of the
6 question. It's not even a question.

7 Q. (BY MR. POULIN) That's not very helpful, is
8 it?

9 A. I don't know what I'm being asked, Rich.

10 Q. Well, you stated earlier that you're
11 satisfied that what the Port's doing is making things
12 better. And looking at these reports, I have to ask,
13 how can you possibly know? How can you easily compare
14 what's being packaged in this format with the previous
15 year's report?

16 A. Well, again, I'll go back to what I
17 previously said. As you go year to year and look at
18 the actual quality of the stormwater effluent, it's my
19 evaluation, and again with the qualifier that I haven't
20 done a formal analysis on this, but my thumbnail sketch
21 evaluation is that there is a trend of improving
22 stormwater quality at the outfalls that they're
23 monitoring.

24 And I'll go further and say that I believe a
25 reason for that improvement are the source control

1 efforts going on by Port of Seattle staff at the
2 airport. And I believe they've done a very credible
3 job at when they found that they were having fecal
4 coliform problems in one particular subdrainage, of
5 tracking down the source of that fecal coliform to a
6 Dumpster that was being improperly managed, and putting
7 controls on that.

8 Another instance I recall is they've found --
9 and this refers to fecal coliform again -- where waste
10 from the aircraft, where that was being managed or
11 disposed of didn't have tight enough stormwater
12 controls on that, they got on top of that.

13 In the case of deicing controls, they've in
14 my opinion successfully tracked down where the real
15 problem subdrainages are for aircraft deicing runoff.
16 And they're taking steps, in some cases I believe
17 they've already completed, in one particular case of
18 rerouting those problem drainages into the industrial
19 wastewater system.

20 So I guess perhaps I choose to look on these
21 reports as the glass being half full rather than half
22 empty.

23 Q. We've talked considerably about copper today,
24 but looking at the discussion of copper here, the first
25 thing they say on Page 33 of Exhibit 6 is, "Overall, in

1 312 samples in the past six years, the median copper
2 value for all outfalls sampled is," paraphrasing, blah,
3 blah, blah.

4 Now, they're taking a composite of samples
5 from over six years, but more than that, they're
6 conglomerating all outfalls sampled, some of which may
7 not have any copper at all. Where's the discussion
8 that focuses on the places where copper is actually a
9 problem?

10 A. I don't know where that is in this particular
11 report. As I told you before, I have not had
12 opportunity to review the 2001 report. Is that the one
13 that you're quoting from? Which report are we on?

14 Q. That most recent quote was indeed from the
15 2001 report.

16 A. Exhibit 6, okay.

17 Q. The next thing they say there, and this very
18 closely tracks the discussion in the 1999 annual report
19 on Page 23 --

20 A. Are we on Page 23 of the 2001 report?

21 Q. Let's look at Page 23 of the 1999 report.

22 A. Okay.

23 Q. There they discuss 225 samples in the past
24 five years, but in the next sentence in both, they
25 discuss airfield and landside outfall data in this case

1 are similar.

2 Well, perhaps we should move on. We haven't
3 talked about fecal coliform. Isn't it true that fecal
4 coliform has been a problem area for some of the Port's
5 discharges?

6 A. Yes. On occasion, yes.

7 Q. And isn't it true that some of the Port's
8 discharges have violated the water quality criteria for
9 fecal coliform?

10 A. Yes.

11 Q. Isn't it also true that the receiving waters,
12 one of the receiving waters is on the 303D list --

13 A. Yes.

14 Q. -- for fecal coliform?

15 A. Yes. I believe that's Des Moines Creek.

16 Q. Does Ecology have any evidence that the BMPs
17 the Port has proposed to address stormwater runoff are
18 effective to reduce concentrations of dissolved metals?

19 A. There is some evidence to support that for
20 some of the treatment BMPs that the Port has proposed,
21 for example, compost media filters and other types of
22 filter media treatment BMPs, that there is treatment
23 for -- that they can successfully treat and remove
24 dissolved metals.

25 Q. Do you know what the relative degree of that

1 success is, what portion of dissolved metals you might
 2 expect to be removed?
 3 **A.** I can't recall what the specifics of
 4 performance of these treatments are other than that in
 5 the suite of different treatment BMPs that the Port is
 6 considering or has into effect, that they do have --
 7 some of those treatment BMPs do have the capability of
 8 treating for dissolved metals, and further, that they
 9 also have the ability to treat for particulates, metals
 10 in the particulate form.
 11 **Q.** During your term as the acting permit or
 12 facility manager for the NPDES permit at Sea-Tac
 13 International Airport, did you take any enforcement
 14 actions against the Port of Seattle?
 15 **A.** I don't know if it was during my term as the
 16 facility manager or whether I was the -- in my capacity
 17 as a unit supervisor, but I do recall a couple of
 18 occasions when we took enforcement actions against the
 19 Port of Seattle; one for their construction operations
 20 at the north employees parking lot, and the other for
 21 their operation of a cement batch plant.
 22 **Q.** Have you ever imposed a fine on the Port?
 23 **A.** Yes.
 24 **Q.** For violations?
 25 **A.** On two occasions that I can recall.

1 vaults.
 2 **Q.** How long does concrete have to cure before
 3 the pH issue is no longer a problem?
 4 **A.** I do not know. That's something that's -- as
 5 your source from King County tells you, it's something
 6 they've recently become aware of. Like a lot of stuff
 7 in stormwater, there's always some new problem popping
 8 up.
 9 **Q.** Does Ecology know institutionally or is it an
 10 unresolved issue?
 11 **A.** I don't know, when you say does Ecology know
 12 institutionally.
 13 **Q.** When you say you don't know, do you mean you
 14 personally don't know, or are there other people in
 15 Ecology that probably do, or do you think no one knows?
 16 **A.** What I'm aware of is that our stormwater
 17 inspector, Ron Devitt, through the course of his duties
 18 became aware of this as recently as -- I'm talking
 19 about in March of 2001. And he is working very
 20 diligently, as a number of people in Ecology do, to
 21 raise attention on this matter, that this is a water
 22 quality concern.
 23 **Q.** But again, this points out that everyone is
 24 in the learning process on stormwater. Anyone that
 25 says that they know everything there is to know about

1 **Q.** Do you recall the violation and/or the
 2 amount?
 3 **A.** I think for the violation at the cement batch
 4 plant, I believe that was a 6- or \$8,000 fine, and I
 5 think for the north employees parking lot violations,
 6 that was somewhere between 16- and \$20,000. I'm sorry,
 7 I'd have to go back and actually review the enforcement
 8 fines.
 9 **Q.** Your mention of concrete reminds me that the
 10 King County water quality specialist noted that King
 11 County has recently become aware of pH problems that
 12 can result from improper curing of stormwater vaults.
 13 Are you aware of that issue?
 14 **A.** Yes. Actually, we're working along with King
 15 County on that problem. It was one of our water
 16 quality inspectors who first brought that to a number
 17 of people's attention, Ron Devitt, D-e-v-i-t-t.
 18 **Q.** The comprehensive stormwater management plan
 19 associated with the third runway and master plan update
 20 projects proposes the construction of a number of new
 21 stormwater detention vaults; is that right?
 22 **A.** Uh-huh.
 23 **Q.** Will they be concrete vaults?
 24 **A.** Some I believe will be concrete. I believe
 25 the wet vault facilities proposed will be concrete

1 stormwater is dead wrong or a fool.
 2 **Q.** I want to briefly address the recent permit
 3 modification relating to construction-related
 4 stormwater discharges in the Walker Creek and Gilliam
 5 Creek basins. I believe you agreed earlier that the
 6 provisions of --
 7 **A.** Can I take a quick head break?
 8 **MR. POULIN:** Sure, yes.
 9 (Recess taken.)
 10 **MR. POULIN:** Perhaps we should discuss
 11 timing. I'm happy to continue today as late as you all
 12 would like. I'm fairly convinced that unless you're
 13 interested in going quite late, I'm not going to make
 14 it through all the subject matter that I have. But
 15 again, I'm happy to press on.
 16 **MR. YOUNG:** I'm inclined to say that at 5 the
 17 deposition as far as we're concerned is concluded. And
 18 if you want to add more time, you'll have to ask the
 19 Board for more time.
 20 **MR. POULIN:** Well, I believe under the civil
 21 rules, the deposition is open-ended until its purposes
 22 have been satisfied. And your obligation will be to
 23 move for protective order if you believe that something
 24 about the conduct of the deposition has been
 25 unacceptable or in conflict with the rules.

1 MR. YOUNG: Well, first of all, you all said
2 you needed one day, which is what you will have at
3 5:00. Second of all, we have a tremendous number of
4 depositions that need to be conducted in this case
5 before the discovery cutoff in two weeks, and so I
6 don't believe that it makes sense to have him come back
7 for another day.

8 I also would note that your clients, the ACC,
9 have taken a position that it's unreasonable for their
10 experts to come back for two days, so I think that it's
11 unreasonable for your experts to come for two days,
12 it's unreasonable for our experts to come in two days,
13 particularly when you indicated you would only need one
14 day in the first place. So I'm willing to go till 5 or
15 5:30 or even 6:00, but we're not coming back for a
16 second day.

17 MR. POULIN: Well, I am not personally aware
18 of the discussions in which you say ACC indicated that
19 it only needed one day. I'd be surprised if they
20 closed the door on going longer. It certainly is not
21 what happened with the Kenny deposition or the Kelly
22 Whiting deposition, both of which have been continued.

23 MR. YOUNG: Kelly Whiting is coming back
24 solely for the purpose of questioning with regards to
25 his review of the December 2001 stream flow plan,

1 otherwise that deposition is concluded.

2 We can conclude Kelly Whiting in one day, we
3 can conclude Ray Hellwig in one day, we can certainly
4 conclude Kevin Fitzpatrick in one day. The Ann Kenny
5 deposition was carried over for another day because Ann
6 Kenny is the author of the 401.

7 MR. REAVIS: Let me say that no one really
8 agreed to that continuance. It was not finished.
9 Mr. Stock said he would like to do another day, but
10 there was no agreement among counsel to that effect,
11 that that was acceptable.

12 MR. YOUNG: We're not coming back for another
13 day, it's as simple of that.

14 MR. POULIN: Is either of you aware of any
15 agreement that depositions would not take more than one
16 day?

17 MR. YOUNG: You all said you needed one day.
18 I mean, that's what you said at the beginning, and so
19 we gave you a day.

20 MR. POULIN: My guess would be that that was
21 an estimate of how much time the deposition would
22 likely take in a context where the question was, should
23 we schedule this for a half a day or do you think it's
24 going to take longer.

25 MR. YOUNG: Well, it was identified that this

1 was the time that you needed, so this is what we
2 scheduled.

3 MR. POULIN: Well, I guess we'll have to go
4 back to the deposition notice and see what it says. I
5 would note that with respect to Kelly Whiting, of
6 course he's not represented by the Attorney General's
7 office, and I would note that he has yet to be cross-
8 examined by either the Port or by Citizens Against
9 Sea-Tac Expansion. So I don't believe that his
10 deposition has been concluded or will be limited to the
11 issues that you've described.

12 MR. YOUNG: Oh, yes, it's quite clear, it's
13 on the record. You can review the record.

14 MR. POULIN: Oh, I understand you stated
15 that; I was in the room.

16 MR. YOUNG: And Rachel agreed to that. She
17 subsequently, in fact, wrote me a letter saying that
18 yes, that's what we agreed to, and she had a couple
19 additional subjects she wanted to talk about which we
20 can discuss. But that is what the agreement was. Now,
21 all of this is just wasting time.

22 MR. POULIN: Sure. Let's not waste
23 additional time.

24 Q. (BY MR. POULIN) When we spoke previously
25 earlier today, I believe you agreed that the

1 conditions, Permit Condition S2.C.2.a, was added to the
2 permit with a recent major modification and does not
3 apply to any construction-related stormwater discharges
4 except for those in the Miller and Gilliam Creek
5 drainages; is that right?

6 A. Correct, other than those, in reading S2.2,
7 Monitoring Schedule for Construction Stormwater
8 Discharges to Walker Creek and tributaries and Gilliam
9 Creek and tributaries. So S2.A (sic), it would follow
10 applies to those watersheds.

11 Q. So in order to find out the monitoring
12 requirements applicable to all of the other previously
13 authorized construction-related stormwater discharges,
14 we would look to S2.C.1; is that correct?

15 A. (Witness reading document). Yes.

16 Q. Would you agree that the requirements of
17 S2.C.1 apply only to those construction projects
18 required to have a Stormwater Pollution Prevention Plan
19 under Special Condition S13 of the permit?

20 A. (Witness reading document). Yes.

21 Q. Turning to Condition S13 on Page 39 of the
22 permit, could you please explain your understanding of
23 this phrase, "five or more acres of total land area (or
24 other minimum land area to be determined by federal
25 regulation)"?

1 A. Certainly. The five or more acres is the
 2 current threshold for the required general stormwater
 3 permit for construction activity. Any construction
 4 project which disturbs five or more acres is required
 5 to have coverage under that general permit if they
 6 don't have coverage under an individual permit.

7 And then five or more acres of total land
 8 area or other minimum land area, that is to make sure
 9 -- that was put in there to provide language to keep
 10 current with any newly promulgated federal regulation
 11 which might decrease that five or more acre threshold.

12 Q. Is it your understanding that, then, five
 13 acres is the applicable minimum at present?

14 A. For the required --

15 Q. For this permit.

16 A. It's the applicable -- for the requirement
 17 for the Stormwater Pollution Prevention Plan for
 18 construction activities, that's the threshold. Any
 19 construction project at the Port of Seattle that will
 20 disturb five or more acres would then trigger this
 21 requirement S13.

22 Q. And what about construction projects
 23 disturbing less than five acres?

24 A. If it's a project that disturbs less than
 25 five acres, it wouldn't trigger this requirement.

1 Ecology is aware of that and interprets it to reduce
 2 this minimum below five acres.

3 A. Well, our interpretation, the reason why we
 4 created the S13 condition was to make sure that this
 5 individual permit was in compliance with the stormwater
 6 regulations, EPA's stormwater regulations. EPA's
 7 stormwater regulations require a construction activity
 8 permit which follows that they have to have sediment
 9 erosion control plans for projects that disturb five
 10 acres or more.

11 We cover the Port's industrial activities
 12 under other portions of this permit, and so if there's
 13 construction activity occurring of five acres or less
 14 in an area where the Port's conducting construction
 15 activity, that activity is being monitored -- or, I'm
 16 sorry, that portion of the facility is being regulated
 17 under the industrial activities section of this permit.

18 That is why we call out certain outfalls for
 19 monitoring, because those are outfalls that are
 20 characteristics of portions of the facility where we
 21 have industrial activities taking place at the airport.
 22 And by "industrial activities" I mean subbasin areas of
 23 the airport where there's fueling of aircraft taking
 24 place or deicing of aircraft taking place or where
 25 those aircraft may be -- the deicing aircraft may be

1 Q. And so because of the related nature of the
 2 provisions, not only would there be no Stormwater
 3 Pollution Prevention Plan under S13 but, likewise, no
 4 monitoring at all under S2.C.1; is that right?

5 A. Correct, unless the construction project -- I
 6 wouldn't want to say no monitoring at all because the
 7 construction project might indeed lead into stormwater
 8 drainages that are monitored under other sections of
 9 the permit.

10 Q. Isn't it true that the permit does not
 11 require monitoring of discharges from construction
 12 projects that result in disturbance of less than five
 13 acres?

14 A. If a construction project is less than five
 15 acres, it would not -- this Condition S13 would not
 16 kick in, correct.

17 Q. Is it your understanding -- I don't mean to
 18 be obtuse; I perhaps should explain. My reading of the
 19 federal regulation is that the five acre minimum should
 20 not apply at Sea-Tac because the construction is all
 21 related to the activities at an industrial site which
 22 is subject to the permit.

23 And I wanted to find out -- I don't have the
 24 citation of the specific federal regulation with that
 25 provision buried in its terms, but I wanted to know if

1 taking off.

2 Q. Do you know if Ecology intends to apply the
 3 requirements of new Condition S2.C.2 to all
 4 construction stormwater discharges in the new permit
 5 instead of just the Walker and Gilliam Creek basin
 6 projects?

7 A. Are you referring on the reissuance of the
 8 permit?

9 Q. Yes.

10 A. That is something that we have discussed and
 11 are considering for the reissuance of the permit, yes.

12 Q. Do I recall your stating earlier that Ed
 13 Abbasi will be reviewing the Port's application for the
 14 renewal program?

15 A. Yes.

16 Q. Will you be involved in that review process?

17 A. No. Ed's the facility manager; I'm trusting
 18 on his professional capabilities as an environmental
 19 engineer and professional engineer to do that. That's
 20 his baby.

21 Q. Ann Kenny testified in her deposition that
 22 the 401 certification can be changed and could be
 23 modified by future changes in the Port's NPDES permit
 24 Do you agree with that view?

25 A. Ann is the expert on the 401 water quality

1 certification, and so if she stated that, I would have
2 to defer to her expertise on that.

3 Q. Have you reviewed the water quality
4 components in the low flow plan submitted by the Port
5 in support of the 401 certification request?

6 A. I think I may have glanced at them, but
7 that's not a part of the water quality certification
8 that I was really reviewing.

9 MR. POULIN: I'd like to introduce a new
10 exhibit.

11 (Deposition Exhibit No. 140 was marked for
12 identification.)

13 Q. (BY MR. POULIN) I'd like to explain, this is
14 a portion of the most recent version of the Low
15 Streamflow Analysis and Summer Low Flow Impact Offset
16 Facility Proposal submitted by the Port in December of
17 2001. In compiling this exhibit, I included the title
18 page, the table of contents, and two sections of
19 Volume 1, the water quality design aspect of the
20 mitigation proposal that's captured in Section 3.4, and
21 also the monitoring plan that's described in Section 5.

22 Would you agree that the Summer Low Flow
23 Impact Offset Facility Proposal is to capture rainwater
24 or stormwater during the rainy season, store it, and
25 subsequently release it when needed for mitigation

1 purposes during the summer dry season?

2 A. I understand that that's a proposal to
3 mitigate for the base flow impacts from the project,
4 yes.

5 Q. So do you understand that this proposal will
6 result in direct discharges to the creeks?

7 MR. REAVIS: Objection; vague.

8 Q. (BY MR. POULIN) I'd like to clarify. Do you
9 understand that this proposal will result in direct
10 discharges of stored stormwater to the creeks?

11 A. I don't know the details of how they will
12 deliver up that stored water. There's been, as far as
13 I know, a number of proposals of how that water would
14 be delivered back into the stream, and that's as far as
15 my knowledge goes. I mean, one of the proposals I
16 heard that was put forth was actually to reinfiltrate
17 some of that water and allow it to enter back into the
18 stream through groundwater base flow.

19 Q. Do you personally not have any role in the
20 review of this proposal?

21 A. I do not have any role in the review of that
22 proposal, no.

23 Q. Do you know who does?

24 A. The two people that I'm aware of who are
25 involved in review of the proposal, we've contracted

1 Kelly Whiting, Department of Ecology has contracted
2 Kelly Whiting to review and comment on the proposal.
3 And I believe John Drabek also was -- I guess to best
4 describe it is assisting Ann in understanding the
5 comments and concerns coming back from Kelly Whiting on
6 the proposal.

7 Q. Just as background on my further questioning,
8 I'd like you to understand that this proposal states
9 that, "Ecology has defined standards for water quality
10 related to stormwater release, including periods of low
11 flow. Ecology has jurisdiction to monitor and enforce
12 these standards through their National Pollution
13 Discharge Elimination System (NPDES) Permit. These
14 standards include" -- ellipses, dot, dot, dot, I'm
15 adding -- "dissolved metals."

16 It states further down that "the water
17 quality standards discussed in this report are those
18 listed for Class AA water bodies, which are the most
19 stringent standards. Water quality standards for
20 metals are based on toxicity" -- again ellipses -- "and
21 are listed in WAC 173-201A-040 (Toxic Substances)," the
22 section we've been discussing for much of the day.

23 It next states, "Ecology has started the
24 process to potentially revise state water quality
25 standards."

1 Are you aware of that effort?

2 A. Certainly that's part of the state's
3 triennial review process. I read that statement as
4 reflecting that the state's triennial review process is
5 underway of our state water quality standards.

6 Q. You'll see on Page 3-8 a discussion of metals
7 of concern including copper, lead and zinc. The Port
8 explains that, "Washington State water quality
9 standards for these metals are based on the dissolved
10 fraction, are dependent on the hardness of the water,
11 and, as with all water quality standards, are
12 applicable to the receiving waters."

13 A. Yes.

14 Q. I'd like you to join me in reviewing the
15 proposed monitoring plan for this facility to see if
16 the Port intends to do the kind of monitoring that's
17 necessary to determine whether their discharges can be
18 expected to result in violations of state water quality
19 criteria in the receiving waters.

20 If you turn to Page 5-3, this proposal states
21 under the heading 5.1.3.6, Metals, "Samples will be
22 analyzed for copper, lead and zinc. The samples will
23 be obtained from discharge points in receiving waters
24 (approximately 100 feet downstream from where
25 discharges enter the streams). The metals sampling and

1 analysis will occur upon opening of Flow Impact Offset
2 Facility outlets and a minimum of monthly throughout
3 operation of the facility."

4 It doesn't appear that the Port intends to
5 sample for hardness, does it?

6 MR. YOUNG: I object. Lack of foundation.
7 This is only a portion of this document. This witness
8 has not seen this document before, I don't believe,
9 and --

10 MR. POULIN: A simple concise objection will
11 be sufficient.

12 MR. YOUNG: I'm making my objection.

13 MR. POULIN: You're making a speech.

14 MR. YOUNG: And he has not -- it's only a
15 partial exhibit. He's never seen it before and he's
16 testified that he's not going to review it.

17 Q. (BY MR. POULIN) Please answer the question.

18 A. I can't answer the question because I don't
19 believe all the information on how they're doing
20 sampling has been presented to me. Again, I have not
21 seen this document before, and in the line of my
22 duties, I will not be reviewing this document.

23 Q. Would you agree that there's no indication in
24 the language we just looked at to suggest that the Port
25 intends to monitor for hardness in the receiving waters

1 Q. Could I ask where you're reading that?

2 A. At the top of 5.1.3, Operational Monitoring.
3 Now, what I would hope would be pointed out to them by
4 whoever is providing comment back to them, and this is
5 submitted to Ecology in December of 2001, my hope is
6 that they would point out to them the need to do
7 hardness sampling.

8 Q. Should that be a requirement?

9 A. This document's currently under review by
10 Ecology.

11 Q. Shouldn't that be a requirement imposed by
12 Ecology rather than a suggestion?

13 A. In order -- this has to be approved by
14 Ecology, and certainly it would be a requirement for
15 approvals of such a plan, of such a monitoring plan.

16 This document to my understanding as to the
17 way that we approve monitoring plans, we only approve
18 those monitoring plans if they're monitoring for all
19 necessary parameters, and one of those necessary
20 parameters, as you've pointed out, is hardness. And
21 that appears to me as if that has been overlooked here.
22 But again, this is a document that my understanding of
23 it, gosh, we just got this -- we're currently reviewing
24 this right now.

25 Q. None of the other monitoring plans that

1 or in discharges from their proposed facility?

2 MR. YOUNG: I object. The document speaks
3 for itself.

4 A. Without seeing the entire document, I don't
5 know what type of receiving water monitoring they'll be
6 doing. If somewhere in this document there's receiving
7 water monitoring going on as part of the low flow
8 analysis, I'm assuming that any type of receiving water
9 monitoring that they would be doing would include
10 analysis for hardness.

11 Q. (BY MR. POULIN) I'll direct your attention
12 to Page 5-2 and Paragraph 5.1.3 where the proposal
13 states that, "The monitoring proposal for the Flow
14 Impact Offset Facility includes the following
15 monitoring components: Water levels within the
16 stormwater vaults, flow, turbidity, DO, temperature,
17 and metals."

18 A. Right. And I would point to before that,
19 "The Port is proposing to monitor the operation of Flow
20 Impact Offset Facility to provide assurance that the
21 facility is achieving its performance goals and not
22 causing any water quality violations in the receiving
23 waters. This will be accomplished by periodic
24 monitoring of both the discharge and receiving waters
25 during the annual operation" --

1 Ecology has approved have required monitoring for
2 hardness, have they?

3 A. What other monitoring plans Ecology's
4 approved? I don't understand.

5 Q. For instance, stormwater monitoring plans,
6 SWPPPs submitted to Ecology pursuant to the NPDES
7 permit.

8 A. If you're talking about the stormwater
9 monitoring plans for construction activity, our main
10 concern on construction activity is turbidity, and what
11 we're looking for there is where they're going to be
12 monitoring their facilities for those construction
13 projects for turbidity.

14 Q. Let's shift gears.

15 How did it come to be that the King County
16 Surface Water Design Manual basic menu became the
17 standard for the Comprehensive Stormwater Management
18 Plan for the Port's proposal?

19 MR. YOUNG: I object. Lack of foundation.

20 THE WITNESS: What am I supposed to do?

21 MR. YOUNG: You can go ahead and answer, I'm
22 sorry. If you can answer, go ahead and answer. If yr
23 understand his question, you can answer it.

24 Q. (BY MR. POULIN) Would you agree that the
25 Port has invested considerable effort to demonstrate

1 that its proposal complies with the requirements of the
2 King County Stormwater Design Manual?

3 A. Correct. And one of the reasons for that is
4 the Port's stated intention for its stormwater
5 management plan is that it would meet necessary
6 requirements of the King County Design Manual as well
7 as the -- what was at the time Department of Ecology's
8 stormwater manual, I believe, which is the stormwater
9 manual for Puget Sound.

10 Q. And do you know why that is?

11 A. Why what is?

12 Q. I thought you said that that was the Port's
13 stated objective or intention. Do you know why they
14 sought to meet those standards?

15 A. I would have to assume that the Port was
16 intending to demonstrate that they're meeting not only
17 state standards but applicable local standards, local
18 standards that the surrounding communities to the Port
19 are subject to.

20 Q. Aren't the most relevant standards for
21 Section 401 certification purposes the state water
22 quality standards?

23 A. There's the state water quality standards,
24 but you also have the design requirements that are --
25 were in the Puget Sound Stormwater Manual and in King

1 MR. YOUNG: At 6:00.

2 MR. POULIN: You previously said 5.

3 MR. YOUNG: Well, I said I was willing to go
4 to 5:30 or even 6, and I'm willing to do that. But at
5 that point we're done.

6 MR. POULIN: Well, you're welcome to leave,
7 but I reserve the right to indicate that I haven't
8 finished my questioning. And I'm happy to go until 6.
9 (Discussion off the record.)

10 (Recess taken.)

11 Q. (BY MR. POULIN) Let's go back on. It's
12 4:59.

13 Kevin, did I understand you to state that you
14 were not involved in reviewing the water quality
15 implications of this Low Streamflow Analysis and Summer
16 Low Flow Impact Offset Facility Proposal?

17 A. Correct.

18 Q. Could you refresh my memory as to who you
19 said was in charge of reviewing the water quality
20 impacts of this low flow plan and facility?

21 A. I believe that this is being reviewed by John
22 Drabek and it may also be under review by Ed Abbasi.

23 Q. And how will their --

24 A. Let me also state that because this is an
25 analysis on this low flow impact offset facility

1 County's Stormwater Design Manual.

2 Q. Compliance with those manuals does not assure
3 compliance with state water quality standards, does it?

4 A. Compliance with those manuals -- well, I
5 don't believe that King County makes the -- or
6 Department of Ecology, for that matter, has ever made
7 the type of categorical statement that you comply with
8 these manuals and you're entirely in compliance with
9 the state water quality standards. I don't think they
10 would make that type of leap, nor could they make that
11 type of leap.

12 Q. So you'd agree that they're independent
13 standards?

14 A. Well, it's apples and oranges, isn't it? I
15 mean --

16 Q. That's the question.

17 A. Well --

18 MR. POULIN: Could we go off record for a bit
19 (Recess taken.)

20 MR. POULIN: Back on the record at 4:54.
21 I guess we'll reserve any further discussion of the
22 time limits applicable to these depositions, and I'll
23 continue questioning.

24 MR. YOUNG: Yeah, but at 6:00 we're leaving.

25 MR. POULIN: At 6:00?

1 required by the water quality certification, I believe
2 that Ann Kenny would be in that review loop as well.

3 Q. Can you please turn to Exhibit 1 which I
4 handed out earlier, and tell me, if you can, where the
5 provision pertaining to this report and Ecology's
6 review and approval authority is?

7 A. (Witness reviewing document).

8 MR. REAVIS: Page 22.

9 A. Thank you.

10 Q. (BY MR. POULIN) Yeah, to save time, I just
11 came across that as well.

12 A. I believe this comes out of right there in
13 Paragraph 1. "In order to ensure clarity, within 45
14 days of receipt of this Order the Port shall submit a
15 revised plan integrating the Low Streamflow Analysis
16 and Summer Low Flow Impact." And I believe that's what
17 this is.

18 Q. And doesn't this Section I.1 of the water
19 quality certification on Page 22 state that Ecology has
20 already -- and that's my term -- Ecology has reviewed
21 and approved the December 2000 version of that report,
22 the Low Streamflow Analysis?

23 A. Well, it says it's reviewed and approved the
24 December 2000 Low Streamflow Analysis, and then there
25 was also a Summer Low Flow Impact Offset Facility

1 Proposal dated July 23, 2001.

2 Q. Now, do you see --

3 A. So I understand both of those documents have
4 been reviewed and approved.

5 Q. Do you see any provision of this Section 1
6 that requires subsequent review and approval of this
7 December 2000 plan?

8 MR. REAVIS: 2001?

9 Q. (BY MR. POULIN) Thank you. December 2001
10 plan?

11 A. Well, I'd have to go through -- this is a
12 lengthy condition here of what this revised plan must
13 have.

14 Q. Right. Well, I understood you to state
15 earlier that this -- that whatever this plan that I
16 have partially excerpted in Exhibit 140 does or states
17 is subject to further review and approval, and so I
18 thought you might know where that requirement of
19 further review and approval is. And, frankly, I'm not
20 seeing it here.

21 A. Well, what's here is everything that this
22 revised document must have in it, including monitoring
23 and reporting requirements, what a minimum -- addresses
24 the following elements. And if you'll look in there
25 under (e)(v), and again, this is what this recently

1 Q. Did you review the water quality implications
2 of the MSE wall as part of the 401 certification?

3 A. I guess reviewed as part of -- as it was
4 addressed in their stormwater management plan.

5 Q. To what extent was it addressed in that plan?

6 A. What I recall is given the proposed structure
7 and slope of the wall, the types of stormwater
8 facilities that would have to be constructed in order
9 to accommodate the design of the wall.

10 Q. Do you know what the date of that monitoring
11 plan was?

12 A. I didn't say it was a monitoring -- it was a
13 stormwater management plan.

14 Q. Management plan, I'm sorry. Thank you.
15 Do you know the date of that plan that you reviewed?

16 A. That review, along with a number of other
17 people in the water quality section -- well, when I say
18 "number of other people," I had part in that review
19 along with John Drabek and also Kelly Whiting was our
20 main review authority, if you will, on the stormwater
21 management plan. But I recall reviewing aspects of
22 that plan, their most recent plan that was submitted I
23 think just prior to issuance of the 401 certification.

24 Q. So to paraphrase, then, the management plan
25 that you reviewed was issued in August or September of

1 submitted plan must include, it must include
2 "Contingency if water quality in vaults does not meet
3 water quality criteria."

4 So what that says to me is that they'd have
5 to have a means in the plan to determine if that
6 collected and stored stormwater is indeed meeting water
7 quality criteria. And it would follow that what they
8 would have to do is monitor instream receiving water
9 hardness.

10 Q. Well, you'd think so.

11 Did I understand you to state you have not
12 reviewed the previously submitted Low Flow Analysis or
13 Low Flow Impact Offset Facility Proposal?

14 A. No.

15 Q. You weren't in on that loop?

16 A. No.

17 Q. Did anyone report to you about their review
18 of the water quality aspects of those plans?

19 A. No.

20 Q. So it may be that John Drabek or Ed Abbasi or
21 Kelly Whiting has looked into it but they didn't --

22 A. They wouldn't report to me, they would have
23 reported to Ann. Ann relied upon them to do the
24 reviews of these plans since Ann was the project person
25 for the water quality certification.

1 2001; is that right?

2 A. I'd have to look back at the records as to
3 when their final stormwater management plan was
4 submitted, but that sounds about right. I think it may
5 have been July of 2001.

6 Q. But you're sure it was before the issuance of
7 the certification, the 401 certification?

8 A. I believe it was.

9 Q. Have you reviewed a Hart Crowser report
10 relating to the design of the MSE wall that was
11 submitted to Ecology in November?

12 A. No.

13 Q. Are you aware that that report proposes
14 significant changes to the design of the MSE wall?

15 A. I'm not aware of the report so I don't know.

16 Q. You haven't heard any mention of the
17 substance of that report or any design change?

18 A. No.

19 Q. So you haven't reviewed any water quality
20 implications that might result from such a change?

21 A. No, but -- no.

22 Q. Is it true that the Port has proposed an
23 expansion of its industrial wastewater system?

24 A. Yes.

25 Q. Is it true that that expansion project is not

1 considered part of the master plan update project?
 2 **A.** Yes. The expansion and improvements of their
 3 industrial wastewater system were driven primarily by
 4 the NPDES permit.
 5 **Q.** Is it true that not all of the metals-
 6 generating surfaces at Sea-Tac International Airport
 7 are being routed to the IWS for treatment?
 8 **A.** That's correct, that they do have some metal-
 9 generating surfaces, some roofs and downspouts that are
 10 not going into the industrial wastewater system.
 11 **Q.** And isn't it also true that a part of the
 12 stormwater runoff from the runways themselves is not
 13 routed to the IWS system for treatment?
 14 **A.** Yeah, there's large portions of the runways
 15 that go into the stormwater system and not into the
 16 industrial wastewater system.
 17 **Q.** And the Port is not proposing to route
 18 stormwater runoff resulting from the third runway to
 19 the IWS, is it?
 20 **A.** No, I don't believe that that's -- I believe
 21 there's a contingency that if they find -- well, I
 22 won't speculate on that. But, yes, I believe most of
 23 the stormwater runoff from the third runway go into a
 24 stormwater system and not into the industrial
 25 wastewater system.

1 **Q.** Let's turn to your work on the clean fill
 2 criteria aspect of the 401 certification.
 3 **A.** Okay.
 4 **Q.** Who selected the final clean fill criteria
 5 incorporated in the final 401 certification, by which I
 6 mean the amended --
 7 **A.** The acceptable fill criteria?
 8 **Q.** Yes, thank you. I am referring to the
 9 September 21st water quality certification.
 10 **A.** Section E?
 11 **Q.** Yes, Section E, beginning on Page 14.
 12 **A.** The conditions under Section E, those final
 13 draft conditions were proposed by myself, and this was
 14 after working in some consultation with Chung Yee in
 15 our cleanup program.
 16 **Q.** Are you referring to the values in the second
 17 column of the table on Page 17, the --
 18 **A.** Actually, I'm referring to all the
 19 conditions.
 20 **Q.** All the conditions, okay. Including the fill
 21 criteria specified in that table?
 22 **A.** Including what's entitled the fill criteria
 23 limitations for hazardous substances.
 24 **Q.** How did Chung Yee come to be involved in the
 25 project? Could you please tell us who he is?

1 **A.** Yes. Chung Yee was actually -- for a short
 2 time he was a facility manager, I believe, for a period
 3 of about six months of the Sea-Tac Airport permit.
 4 And Chung Yee's background both in water quality and in
 5 the toxics cleanup program made him a good resource to
 6 tap into as we started to think about acceptable fill
 7 criteria for the 401 water quality certification. So
 8 he did some initial work on these acceptable fill
 9 criteria while he was the facility manager for Sea-Tac
 10 Airport. This would be in about August/September 2000.
 11 And then he switched positions within
 12 Department of Ecology to take a toxics cleanup program
 13 position down in our headquarters office in Lacey.
 14 And when our water quality certification -- as we
 15 appeared to be moving toward drafting up a water
 16 quality certification, we called upon the toxics
 17 cleanup program to see if he could involve himself, you
 18 know, lend his technical expertise to the 401 water
 19 quality certification team.
 20 And so I guess to characterize Chung Yee, he
 21 was sort of our consultant from the toxics cleanup
 22 program developing these criteria. And then I worked
 23 along with him.
 24 **Q.** Why didn't the toxic cleanup program itself
 25 develop these fill criteria?

1 **A.** Well, I don't know what you mean by that.
 2 Chung Yee works for the toxics cleanup program. He's
 3 an environmental engineer and a professional engineer
 4 in the toxics cleanup program. And they made his
 5 services available to us in helping to develop these
 6 acceptable fill criteria.
 7 **Q.** Did you also rely on the expertise of Pete
 8 Kmet in developing these criteria?
 9 **A.** Yes. I believe Pete Kmet was -- we sought
 10 review and advice from Pete Kmet on those, as I recall.
 11 **Q.** Isn't Pete Kmet Ecology's resident expert on
 12 hazardous substances?
 13 **MR. REAVIS:** Objection; lack of foundation.
 14 **A.** We have a number of experts on hazardous
 15 substances in the toxics cleanup program. I would say
 16 he's one of those, yes.
 17 **Q.** (BY MR. POULIN) Would you agree that he has
 18 considerably more expertise than Chung Yee?
 19 **A.** I don't have a way of agreeing or disagreeing
 20 with that.
 21 **Q.** Were any of Pete Kmet's recommendations
 22 concerning fill criteria adopted in the final 401
 23 criteria for fill?
 24 **A.** We heard loud and clear from Pete Kmet and
 25 agreed with him that there should be no fill material

1 coming from a contaminated site or even fill material
 2 that's been remediated from a contaminated site. And
 3 so we put that as a condition in here on Prohibited
 4 Fill Sources, on E(d), I think it is, Prohibited Fill
 5 Sources.

6 "The following fill sources are prohibited
 7 for use on Port 404 projects: Fill which consists in
 8 whole or in part of soils or materials that are
 9 determined to be contaminated following a Phase I or
 10 Phase II site assessment." And even further, "Fill
 11 which consists in whole or in part of soils or
 12 materials that were previously determined to be
 13 contaminated by a Phase I or Phase II site assessment
 14 and have been treated in some manner so to be
 15 considered remediated soils or fill material."

16 Q. Did Mr. Kmet submit any written comments to
 17 you or to Chung Yee concerning the proposed fill
 18 criteria?

19 A. I believe that there were -- there was an
 20 e-mail transmission, one or two of those.

21 Q. And do you recall whether Mr. Kmet suggested
 22 a minimum sampling frequency for fill?

23 A. I don't recall -- I'm sorry, I don't recall a
 24 minimum sampling.

25 MR. POULIN: I'd like to help refresh your

1 MR. POULIN: It's entirely possible that --

2 MR. REAVIS: Because my Page 2 has a number
 3 on it that says 2. That's the second page of the
 4 e-mail.

5 MR. POULIN: I was concerned that you might
 6 be missing the conclusion of the e-mail. And if we
 7 could very briefly revise the exhibit, I'd like to get
 8 a quick copy of this. And we'll go off record for just
 9 a moment and I'll do that. Thanks, Mr. Reavis.

10 (Discussion off the record.)

11 Q. (BY MR. POULIN) Back on the record.

12 Thanks to Mr. Reavis, a copy of the original
 13 exhibit, we can now see that this should be a six-page
 14 exhibit, and we in fact were missing the second and
 15 third pages.

16 Now that you see those pages which should be
 17 inserted in Exhibit 15 after the first page, does that
 18 look more familiar to you?

19 A. Yes, it does.

20 Q. Now, on the unnumbered fifth page of this
 21 exhibit which has a couple of two-column tables towards
 22 the bottom, would you agree that Mr. Kmet -- do you
 23 recall now in reviewing this that Mr. Kmet recommended
 24 a higher minimum number of samples than were proposed
 25 in the fill criteria that he reviewed?

1 memory with an exhibit.

2 (Discussion off the record.)

3 (Recess taken.)

4 Q. (BY MR. POULIN) Back on the record.

5 I'd like to have you review this previously
 6 introduced Exhibit 15. Would you agree that this
 7 exhibit appears to be Ann Kenny's copy of an e-mail
 8 that Peter Kmet sent to you?

9 A. Well, what I see what was sent to me is a
 10 word document that says, "Here are my comments. Make
 11 sure you open the attachment." Then, but what follows
 12 is a copy of an e-mail sent from me to Pete. Is this
 13 the opened attachment then?

14 Q. My understanding is that the referenced
 15 attachment is the second, third and fourth pages of the
 16 exhibit.

17 A. Okay.

18 Q. Do you recognize these as the comments that
 19 Pete Kmet sent to your attention?

20 A. You mean the underlined material?

21 Q. Well, I mean the entirety of Pages 2, 3 and
 22 4, unnumbered Pages 2, 3 and 4 of this exhibit.

23 MR. REAVIS: I think it starts with Page 3,
 24 actually, because isn't Page 2 the second page of the
 25 e-mail?

1 A. Yes.

2 Q. Would you agree that Mr. Kmet recommended a
 3 higher minimum number of samples than were adopted in
 4 the final 401 criteria?

5 A. Yes.

6 Q. What was your basis for rejecting his
 7 recommendation?

8 A. I didn't reject his recommendation. I took
 9 the recommendation that came to me from Chung Yee, and
 10 the recommendation that came to me from Chung Yee is
 11 what appears in the water quality certification as the
 12 minimum number of samples.

13 Q. Why did you select as the fill criteria the
 14 minimum number of samples provided to you by Chung Yee
 15 instead of those forwarded to you by Peter Kmet?

16 A. Because Chung Yee was the one who was working
 17 on the final set of conditions that were established in
 18 the water quality certification. This recommendation
 19 from Pete I believe came in September, came by us
 20 September 11, 2000, and then the final draft of these
 21 recommendations went through or came to me from Chung
 22 Yee, gosh, I believe in July of 2001.

23 Q. Did you have any basis to believe that Chung
 24 Yee's work product was superior to Peter Kmet's?

25 A. What I was relying upon was Chung Yee's

1 expertise, and as the person, the staff person from the
2 toxics cleanup program who was selected to assist us in
3 this process. And so what I was relying on is that he
4 had reviewed Pete Kmet's recommendation and that he
5 considered that recommendation and decided to go with
6 what he originally had.

7 Q. So is it your testimony, then, that you did
8 not select the final criteria; rather, Chung Yee did?

9 A. It's my testimony that I relied on the final
10 set of draft conditions that Chung Yee came up with,
11 but I did select his final draft recommendations.

12 Q. Do you know whether Chung Yee had any basis
13 to reject Pete Kmet's recommendations?

14 A. I do not know.

15 Q. So do you know whether Chung Yee's
16 recommendations are superior to those of Mr. Kmet?

17 A. I don't know. Again, what I was relying upon
18 is what Chung Yee provided us in June/July of 2001.

19 Q. Independent of Chung Yee's recommendation,
20 what basis do you have for concluding that the fill
21 criteria he recommended to you is adequate to protect
22 water quality?

23 A. If your question is -- when you say the fill
24 criteria recommended, are you referring to the minimum
25 number of samples that he recommended?

1 that Chung Yee's recommendations were sufficient?

2 A. Yes.

3 Q. Did you ever respond to Mr. Kmet's comments?

4 A. No. I held on to these comments because I
5 knew that we were going to be revisiting this issue
6 eventually when we got around to issuing the 401
7 certification. And I made sure to forward these
8 comments on to Chung Yee.

9 Q. Let's look at the fill criteria themselves,
10 and by that I mean the numeric criteria identified in
11 the second column of the table on Page 17 of the water
12 quality certification, Exhibit 1.

13 MR. REAVIS: Let me just say, I've got just a
14 few more minutes here and then I have to head out, I've
15 got another commitment. So I don't think that we're
16 going to agree on whether or not that's in compliance
17 with the completion of this deposition, but I suggest
18 we take that up later. And I don't know how much time
19 you think it's going to take to go through this subject
20 area, but my guess is it's going to take awhile. So my
21 suggestion would be to go ahead and stop here.

22 MR. POULIN: Well, are you available until 6?

23 MR. REAVIS: Yeah. If you think you can get
24 through this, I can wait until 6.

25 MR. POULIN: Well, I don't think I can get

1 Q. Yes. Yes, I am.

2 A. Okay, that's very different from the
3 acceptable fill criteria. This is for characterization
4 of the fill.

5 And my sense of it is that in light of the
6 fact that we were requiring the Port not to use any
7 fill sources that were contaminated or even fill
8 sources that had in part or whole even remediated soils
9 from contaminated sources, my sense of it is that this
10 testing of this uncontaminated soils would give us a
11 sort of -- a confirmation that indeed we were dealing
12 with uncontaminated sources.

13 Q. Isn't it true that Mr. Kmet commented that
14 the sampling frequency proposed by Chung Yee is, quote,
15 insufficient to determine compliance with the
16 monitoring standards, and further, that the sampling
17 schedule is not likely to find contamination?

18 A. I don't see where it says "not likely to find
19 contamination."

20 Q. You'll find in the underlined text in the
21 third full paragraph on that unnumbered fifth page of
22 Exhibit 15 the full sentence being, "Also, your
23 sampling schedule is not likely to find contamination."

24 A. Okay. I'm now aware of that.

25 Q. So notwithstanding his advice, you thought

1 through it, but in the off chance that we don't have a
2 chance to reconvene this deposition, I'd like to use
3 the time available.

4 MR. REAVIS: Okay, certainly.

5 Q. (BY MR. POULIN) Did you select these fill
6 criteria?

7 A. What I chose to do is include these criteria
8 among the conditions for acceptable fill in the water
9 quality certification, and that's because these were
10 presented to me by Chung Yee as acceptable criteria.

11 Q. Do you have any independent basis for --

12 A. But there's more to -- I mean, you're talking
13 about an entire -- not just this table. I mean, these
14 are all part and parcel of that entire fill criteria
15 condition. I mean, the fill criteria is not just this
16 table alone. You know, it also includes special
17 criteria that come into effect when -- well, you'll
18 notice there's a footnote 3 there of -- you know, a
19 different set of criteria that come in to play for
20 metals like chromium when the fill is placed within six
21 feet of the ground surface.

22 Q. Sure. But let's look at another exhibit.

23 (Deposition Exhibit No. 141 was marked for
24 identification.)

25 Q. (BY MR. POULIN) To my surprise, the Board's

1 Order Granting Motion to Stay the Effectiveness of 401
 2 Certification has not previously been used as an
 3 exhibit. I'd like you to turn to Page 16 of the
 4 Board's Order Granting the Motion to Stay.

5 You'll see that the second column of the --
 6 let me back up. You'll see that the first two columns
 7 apart from the heading correspond to the information
 8 presented in Page 17, the table in Page 17 of the 401
 9 certification, listing the substance or contaminant in
 10 the first column and the fill criteria from the 401
 11 certification in the second column.

12 First off, let me ask, do you have any reason
 13 to disagree with any of the information here in the
 14 third and fourth columns of the table in the Order?

15 **A.** Far be it from me to ever disagree with a
 16 Board decision, but I believe that those are accurate
 17 representations in those third and fourth columns there
 18 for those contaminants of what Puget Sound background
 19 is, where it's known, and then the practical
 20 quantification limits for detection of those
 21 contaminants.

22 **Q.** Would you agree that in several instances the
 23 fill criteria selected in the 401 certification is
 24 substantially higher than the Puget Sound background
 25 and the practical quantification limits?

1 will not be in contact with an active groundwater
 2 component and, therefore, you know, I believe -- and
 3 this is relying somewhat on Chung Yee's expertise, th
 4 because of that, that fill material which was even a
 5 these levels for chromium or nickel or lead, because
 6 you'll notice that for certain metals we match the
 7 Puget Sound background, in particular for copper. But
 8 that given the characteristics of those particular
 9 metals, that as long as they are not in contact with an
 10 active groundwater component, as they would not be in
 11 the proposed fill profile for the third runway, that
 12 that would be sufficiently protective of state ground
 13 waters and surface waters.

14 **Q.** Well, I'd like to ask, if I might use a
 15 colloquialism, where does the buck stop? You state
 16 that you relied on Chung Yee, I believe Ann Kenny would
 17 state that she relied on you, and probably Mr. White
 18 would state that he relied on Ann Kenny.

19 Who has the responsibility for selecting
 20 standards that are known to be sufficiently protective?

21 **A.** I told you I selected these.

22 **Q.** You selected these based on --

23 **A.** Chung Yee's expertise.

24 **Q.** For which you have no independent basis to
 25 confirm or deny or reject?

1 **MR. REAVIS:** Let me just object to this
 2 question because it's a compound question and covers a
 3 number of different constituents and issues. That's my
 4 objection.

5 **Q.** (BY MR. POULIN) Fair enough. Let's look at
 6 arsenic where the 401 fill criteria is 20, Puget Sound
 7 background is 7, and the practical quantification limit
 8 is 1.5, presumably milligrams per kilogram.

9 Doesn't this indicate that the 401
 10 certification accepts fill that is more than double the
 11 background of arsenic?

12 **A.** Of what the Puget Sound background is?

13 **Q.** Yes.

14 **A.** Yes.

15 **Q.** And so with lead where the quantification
 16 limit is just .5 and the background is 24, the lead
 17 value is nearly ten times that, 220, or in some cases
 18 250?

19 **A.** Yes.

20 **Q.** Now, in light of this, I'd like to ask why
 21 you believe that the levels selected in the 401
 22 certification are sufficiently protective of water
 23 quality.

24 **A.** Well, I believe they're sufficiently
 25 protective of water quality because this fill material

1 **A.** I don't understand his question.

2 **Q.** You don't know -- you don't have any reason
 3 to know whether Chung Yee's recommendation is valid or
 4 invalid, adequate or inadequate?

5 **A.** I rely on the fact that of his years of
 6 experience in the toxics cleanup program, his education
 7 and background as an environmental engineer and as a
 8 professional engineer, and his expertise in how
 9 contaminants may or may not become mobile from the
 10 soils in a fill profile.

11 And if you want to know where the buck
 12 stopped on selecting these criterias, I told you, it
 13 stopped with me. And the reason I accepted these is
 14 because of the expertise, experience and background
 15 that Chung Yee had, and that also that he took Pete
 16 Kmet's comments into consideration as well. But why he
 17 made the recommendation that he made to me in the end
 18 is something that you'll have to ask him.

19 **MR. POULIN:** In respect of your request to
 20 stop at 6:00, I'll note that it's 5:59 and a half.
 21 I would like to continue the deposition and would
 22 request that Ecology provide me with a future date
 23 Mr. Fitzpatrick will be available for future
 24 questioning.

25 **THE WITNESS:** If that's to be done over the

1 next two weeks, that is going to be difficult indeed,
 2 because my schedule has filled up for the remainder of
 3 the month.
 4 MR. YOUNG: Yeah, and our position is at this
 5 point in time that we've made him available for the
 6 time that you asked him to be available, and we've got
 7 tons of other depositions that we've got to do in those
 8 two weeks.
 9 MR. POULIN: Well, I believe there are many
 10 days on which no deposition is scheduled, but at
 11 present I will simply close with a request that this
 12 deposition be continued.
 13 MR. YOUNG: And we are objecting to that
 14 request.
 15 MR. REAVIS: As are we, on behalf of the
 16 Port.
 17 MR. POULIN: Thank you. And let's go off
 18 record. It's 6:00.
 19 (Deposition adjourned/concluded at 6:00 p.m.)
 20 (Signature reserved.)
 21
 22
 23
 24
 25

REPORTER'S CERTIFICATE

1
 2
 3 I, DIANE MILLS, 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 30th day of
 20 January 2002.
 21
 22 DIANE MILLS, CSR# MI-LL-SD-M380N3
 23 Notary Public in and for the State
 24 of Washington, residing in King
 25 County. Commission expires 10/10/02.

CORRECTION & SIGNATURE PAGE

1
 2
 3 RE: AIRPORT COMMUNITIES COALITION VS. STATE OF
 4 WASHINGTON, et al.
 5 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
 6 DEPOSITION OF: KEVIN FITZPATRICK; 1/16/2002
 7
 8 I, KEVIN FITZPATRICK, have read the
 9 within transcript taken JANUARY 16, 2002, and the same
 10 is true and accurate except for any changes and/or
 11 corrections, if any, as follows:
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22 Signed at _____, Washington,
 23 on the ____ day of _____, 2002.
 24
 25 _____
 KEVIN FITZPATRICK

AR 028505

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