

**FITZSIMMONS,
THOMAS**

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: Thomas Fitzsimmons, Director, Dept. of Ecology

Date of Deposition: January 18, 2002

1. Admissibility

A. Purpose used for or what it will be offered to prove:

Per CR 32(a)(2), testimony by Director of Department concerning procedure and basis for issuance of Sea Tac 401 certifications showing lack of reasonable assurance. Further offered in response to testimony of Kenny, White, Cheyne, and Leavitt.

B. Specific designation (if CR 30(b)(6) deponent): N/A

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 Fitzsimmons deposition are offered by ACC and CASE:

Page 1 through page 20 line 9
Page 28 line 13 through page 31 line 5
Page 35 line 10 through page 121

3. Counter Excerpts of Respondents: See attached.

4. Objections of Respondents: See attached.

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: **Tom Fitzsimmons**

Date of Deposition: **January 18, 2002**

3. Counter Excerpts by Respondent Department of Ecology:¹

None.

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.

Regarding Mr. Fitzsimmons' transcript ACC and CASE designated three sections of testimony. For the Board's convenience, Ecology responds section by section below.

Section 1. The appellants' first designated section is "page 1 to page 20, line 9."

General nature of objection: On its face, this section does not include testimony helpful to the Board. There are no assertions of facts or legal positions that are material to the issues before the PCHB. Few of the questions in this section would be allowed in a live hearing and none of the answers provide relevant evidence. Specific areas of inquiry are objectionable for the following reasons:

<u>START</u>	<u>END</u>	<u>OBJECTION</u>
Page 5, line 21	Page 7, line 7	No relevance to the factual or legal issues before the board. [Inquiries about Jay Manning's role as attorney for Port of Seattle.]
Page 9, line 22	Page 14, line 9	
Page 14, line 20	Page 16, line 25	No relevance to the factual or legal issues before the board. [Inquiries about Paul Isaki's and Joe Dear's expertise on 401 decisions.]

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.

No relevance to the factual or legal issues before the board. [Inquiries about the witness' knowledge of the Board's stay ruling.]

Section 2. The appellants' second designated section is "page 28, line 13 through page 31, line 5."

General Description of Objection: This section of the deposition relates to the fact that the Governor's office sought status information regarding the 401 Certification and that Ray Hellwig sent an e-mail copied to the Director of the Office of Trade and Economic Development. This section contains no assertions of facts or legal positions helpful or relevant to the issues before this Board. Accordingly, none of the questions would be allowed in a live hearing and none of the questions or answers appear to provide any relevant and admissible information.

Section 3. The appellants offer the remaining **87 pages** of Director Fitzsimmons' deposition, identifying "page 35, line 10 through page 121."

General Nature of the Objection. The appellants' voluminous designation of the last 87 pages is burdensome and again fails to offer material or relevant evidence. Conspicuously, these last 87 pages include no questions that provide material evidence about whether this 401 Certification provides reasonable assurances for protection of water quality. Instead, much of this section includes argumentative questions that voice appellants' implications regarding the mental processes of the decision maker.

Our Supreme Court has concluded that it is simply not appropriate to probe a governmental agency's deliberative process:

Courts cannot, and should not, undertake a probe of the mental processes utilized by an administrative officer in performing his function of decision. *United States v. Morgan*, 313 U.S. 409, 85 L.Ed. 1429, 61 S.Ct. 999 (1941).

Ledgering v. State, 63 Wn.2d 94, 101, 385 P.2d 522 (1963). See *Morgan I*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); *Morgan II*, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938); *Morgan III*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939), and *Morgan IV*, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941). Similarly, this Board reviews the action taken by the agency by examining material facts and applying the appropriate legal standards but not by examining the mental processes of the Director. Appellants attempt to impugn the mental decision making processes of an employee or of the Director does not offer material evidence.² This area of inquiry is contrary to the *Morgan* line of cases and Washington case law, and it ignores the nature of this appeal as a review of a 401 Certification, ignores the *de novo* nature of these proceedings, and ignores the burden of production and proof.

² This is not to say that when an employee offers testimony that a particular fact exists, the appellants cannot test that witness' knowledge of that particular fact. But the deposition of Director Fitzsimmons does not attempt to evaluate any facts that are material to showing whether Ecology has reasonable assurance about the Port's 401 certification.

In addition, the following areas of inquiry are specifically objectionable:

<u>START</u>	<u>END</u>	<u>OBJECTION</u>
Page 35, line 10	Page 36, line 2	No relevance to the factual or legal issues before the board. [The inquiries here relate to the argumentative question of whether the witness believes that the Director of the Office of Trade and Economic Development has expertise relevant to Ecology's rulemaking and the creation of rules.]
Page 36, line 21	Page 39, line 10	No personal knowledge. No relevance to the factual or legal issues before the board. [The inquiries on these 3 pages relate to an exhibit that describes a proposed meeting. Director Fitzsimmons confirms that he did not attend the meeting, does not have personal knowledge of the meeting, nor whether the meeting occurred.]
Page 42, line 15	Page 51, line 24	No relevance to the factual or legal issues before the board. Furthermore, the questions ask the witness to testify about the state of mind of another person. [These 9 pages address whether Tom Fitzsimmons had a meeting with Ray Helwig in advance of his deposition, and then try to compare Helwig's statement describing the purpose of meeting to the Director's description of the purposes of their meeting.]
Page 54, line 25	Page 61, line 10	No relevance to the factual or legal issues before the board. [The inquiries here go into the witness's mental impressions of Tom Luster's expertise and Ray Helwig's expertise at a vague and broad level, and whether the Director discussed the subject of Tom Luster. Director Fitzsimmons' mental impressions on these subjects are not material to this Board's review of the 401.]
Page 61, line 11	Page 77, line 4	No relevance to the factual or legal issues before the board. [These 16 pages address the Director's knowledge that Tom Luster's assignment had been changed and whether he knew that questions had been raised concerning Mr. Luster's ability to be objective, fair, and complete in his evaluation of the 401 material. It also addresses the witness's knowledge of the process where the Port and Ecology withdrew the original 401 and resubmitted. Again, the mental impressions on

these subjects are not material to this Board's review of the 401.]

Page 77, line 5 Page 84, line 3: No relevance to the factual or legal issues before the board. [These 7 pages explore the witness's knowledge of Ecology's use of the deliberative process exemption to a public records request. No substantive evidence is offered material to the issues before the Board.]

Page 84, line 4 Page 98, line 13 No relevance to the factual or legal issues before the board. Moreover, since these involve a question of law regarding the water right issue, the 14 pages of questions provide no evidence of any material fact. [These 15 pages explore the fact that the witness discussed the legal issue of whether an application for a water right is needed for a stormwater project with various people who had different opinions on that legal question.]

SUMMARY OF ECOLOGY'S POSITION

Appellants did not attempt to help the Board by identifying evidence from the deposition of Mr. Fitzsimmons that would be material or relevant to the issues before the Board. For the reasons shown above, the Board should not publish these immaterial portions of Mr. Fitzsimmon's deposition.

Ecology does not object to publishing the following portions of Mr. Fitzsimmons' deposition:

<u>START</u>	<u>END</u>	<u>DESCRIPTION</u>
Page 7, line 20	Page 9, line 21	Education and job experience
Page 39, line 13	Page 42, line 14	Shows that Ecology intended to act on the Port's application by July 2000
Page 99, line 17 to end		Although redundant to existing documentary evidence, this portion of the transcript relates to the Director's knowledge of the issuance, withdrawal and reissuance of the Port's 401 certification in August and September 2001.

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: Tom Fitzsimmons, Director, Dept. of Ecology

Date of Deposition: January 18, 2002

Response to General Objection to "Section 1":

"General objections" to designated deposition portions are not appropriate. ACC will respond to Ecology's specific objections below. ACC notes, however, that Ecology's general objections mischaracterize large portions of the pages to which it objects on a wholesale basis. While there are some introductory questions, laying foundations for questions which came later, specific facts are also elicited concerning the involvement by gubernatorial staff (Paul Isaki, Joe Dear, Ron Schultz) in Ecology's 401 decision, and the Director's concession that these gubernatorial staff persons were involved despite the fact that they have no expertise in the 401 program (*see, e.g.*, deposition at p. 15). Once again, this goes directly to Ecology's repeated claims in testimony and argument before the Board that the 401 should be given deference because it was a product of Ecology's team of specialized experts.

Responses to Specific Objections to "Section 1":

<u>Start</u>	<u>End</u>	<u>Response to Objection</u>
5:21	7:7	These inquiries lay the foundation for subsequent deposition questions concerning how Ecology Director Tom Fitzsimmons made the decision that Ecology would abandon the position that a water right was required for the Port's low flow plan. They establish Mr. Manning's prior involvement with Ecology and lay a foundation for subsequent deposition questions concerning a telephone conference call participated in solely by Mr. Manning, the Director, and Joan Marchioro concerning whether to require a water right.
9:22	14:9	See above response.

- 14:20 16:25 See response to Ecology's general objection to "Section 1" above: once again, Ecology has asked the Board to approve its 401 based on deference to a decision made by a team of experts. ACC is entitled to demonstrate to the Board that it is really being asked to defer to a decision which was heavily influenced by non-expert political operatives in the Governor's office acting in response to pressure from the Port directly on the Governor's office.
- 17:23 20:9 Ecology has repeatedly told the Board that, to the extent the 401 relies on monitoring and subsequent enforcement by Ecology, the Board can assume the presence of reasonable assurance by relying on the fact that Ecology will take necessary actions to ensure compliance with the law. Yet, in Director Fitzsimmons' deposition, he acknowledged that Ecology had taken no action to enforce the stay of the 401 certification which the Board issued in December, and that Ecology had essentially proceeded as if the stay did not exist. This testimony is directly relevant to Ecology's arguments to the Board in support of the 401.

Response to General Objection to "Section 2":

See response to General Objection to "Section 1," above. The Board should note here that Ecology has affirmatively mischaracterized the nature of the testimony in a last-ditch effort at damage control.

Page 28, line 13 through page 31, line 5 attempts to spin-doctor testimony (which continues past page 31) reflecting mixing the 401 certification -- which must be based on the Clean Water Act and water quality standards -- with issues concerning economic development. It lays the foundation for subsequent examination concerning a meeting facilitated by Martha Choe, Director of the State Office of Trade and Economic Development concerning the 401 certification. Ecology offers no specific objection to this testimony apart from its spin-doctoring.

[There are no specific objections to "Section 2"]

Response to General Objection to "Section 3":

The Department of Ecology made an issue throughout the hearing of the need for deference to its decision-making process and its expertise, the propriety and excellence of its staffing of the 401 Certification review, and the

absence of political pressure or influence on that review. See, e.g., Ecology Prehearing Brief at 2 (401 “developed through extensive coordination with Ecology’s experts”); at 4 (deference should be afforded to Ecology because its decision based on specialized knowledge and expertise); at 4 (legal interpretation of Ecology should be given deference). Co-respondent Port of Seattle also claimed that the decision was based solely on Ecology technical expertise and uninhibited legal interpretations. Port Prehearing Brief at 4 (claim that Ecology based 401 on scientific and technical information, and conservative assumptions). The claim was made repeatedly that Ecology had assembled the best team possible and relied upon that team’s judgment in making its 401 decision. Ecology also made a point of asking questions about the process and the basis for the removal of Tom Luster, the Department’s senior 401 expert, from review of the Port’s applications. The suggestion was made that this removal had nothing to do with the Port, and was the result of a routine “regionalization” of Ecology functions. Ecology repeatedly touted its “facilitated” meetings with the Port and offered for the Board’s review the “minutes” of those meetings as showing the basis on which 401 decisions were made.

Having made these points and opened these doors, Ecology now is attempting to keep the Board from reading testimony reflecting the other side of the story, that is, that the Ecology decision was not a product of uninfluenced agency expertise in a routine process, but grew out of intensive and repeated applications of political pressure by the Port through the Governor’s office to substitute political expediency for actual assurance that water quality standards would not be violated.

In essence, then, Ecology wants the Board to defer without knowing what it is deferring to. This would be a disservice to the Board and to the truth-seeking process which must be at the heart of any adjudicative proceeding.

Further, the legal “authorities” which Ecology cites for exclusion of testimony are not on point and do not support its position. For example, *United States v. Morgan*, 313 U.S. 409 (1941), a 60-year-old U.S. Supreme Court case chiefly relied upon by Ecology, concerned a rate-setting proceeding by the Secretary of Agriculture under the federal Packers and Stockyards Act. In holding that the Secretary should not have been examined concerning allegations of bias against him, the Court explicitly relied upon the fact that the rate-setting proceeding conducted by the Secretary “has a quality resembling that of a judicial proceeding.” 313 U.S. at 422. It further held that, “Such an examination of a judge would be destructive of judicial responsibility.” *Id.* The principles annunciated in *Morgan* might apply if the question were whether testimony concerning the Board’s decision-making process could appropriately be included in a record for review. They are not applicable to review of a non-adjudicative decision by Ecology.

Similarly, *Ledgering v. State*, 63 Wn.2d 94, 104, 385 P.2d 522 (1963), a 40-year-old case cited by Ecology, recognized that “there is a distinction between the types of decisions rendered by different administrative agencies and that some agencies perform judicial or quasi-judicial functions while others do not.” Once again, in *Ledgering*, the court held as it did because it determined that:

The director, in administratively suspending an operator’s license under the provisions of RCW 46.20.290, performs an essentially judicial function.

Id. at 105. In short, the ancient authorities cited by Ecology have nothing to do with its decision here. Ecology does not adjudicate concerning 401 certifications -- the Board does -- so Ecology cannot claim exemptions from scrutiny which applies to adjudicative bodies alone. Further, our Washington Supreme Court has recognized in an analogous environmental decision-making context the need for heightened scrutiny where there is a risk that proper decision-making will be undermined by “an atmosphere of intense political pressure.” *Cougar Mountain Associates v. King County*, 111 Wn.2d 742, 749, 765 P.2d 264 (1988).

Respondents cannot play the deference card and affirmatively assert it as a basis for Board approval of the 401, and then complain when appellants offer testimony which impeaches, undercuts, and contradicts its claims. The Board is entitled to -- must, in fairness -- review testimony which illuminates, for example, the actual basis on which the August 401 was withdrawn and the September 401 reissued; which reveals the basis on which Ecology’s senior 401 expert was removed from review of the project; which discloses whether or not the 401 was actually based on reasonable assurance and unfettered agency expertise or unreasonable pressure from the Port and the Governor’s office.

Many of respondents’ objections are also barred by their failure to comply with CR 32(d)(3)(B). Respondents failed to make the necessary objections at the deposition, when corrections could have been made (e.g., to the form of the question, in response to an objection as to foundation, etc.). The rule is clear that, in such circumstances, the objections are waived -- and for good reason. Otherwise, the party failing to object could prevent the introduction of deposition testimony merely by adopting a strategy of failing to speak up at the time of the deposition. That reasonable objections are required is hornbook law. For example, the Washington Civil Procedure Deskbook, published by the Washington State Bar Association, notes:

In essence, the rule provides that if the ground for the objection could have been “removed,” “obviated,” or “cured” by prompt objection, the objection is waived if not made “seasonably.” In ruling on the admissibility of the testimony at trial, the court will not limit its

examination solely to the challenged question. Even if the question is “technically objectionable,” the answer may be admissible if it constitutes “proper evidence.” *Safeco Insurance Co. v. Pacific Indemnity Co.*, 66 Wn.2d 38, 401 P.2d 205 (1965).

Washington Civil Procedure Deskbook at p. 32-16. In particular, the Deskbook warns that objection as to the form of the question, objection as the lack of foundation, objection claiming that a question calls for speculation and similar objections must be made during the deposition or are waived because the objection would “give the opportunity for the examiner to rephrase the question, thus curing the defect.” *Id.* at 32-17; *see, id.* at 32-21; *Young v. Group Health Cooperative*, 85 Wn.2d 332, 534 P.2d 1349 (1975). Further, as the deskbook confirms, even technically objectionable questions in depositions are to be allowed when “the answer furnishes proper evidence. Substance, rather than form, should be heeded.” *Safeco Insurance Co., supra*, 66 Wn.2d at 41.

Responses to Specific Objections to “Section 3”:

<u>Start</u>	<u>End</u>	<u>Response to Objection</u>
35:10	36:2	The objection mischaracterizes the question, the response, and its relevance. They relate to involvement by the Director of OTED, Martha Choe, in the 401 review, and, therefore, to Ecology’s repeated claims to the Board that the 401 is due deference because it was based on supposed application of technical expertise without extraneous factors.
36:21	39:10	The testimony here gave the witness’ understanding of the positions of the persons named in the exhibit. His testimony culminated at page 39, line 10 with the acknowledgement that it was <u>not</u> “typical for the Governor to conduct meetings about pending applications before the Department of Ecology without someone from the Department of Ecology being in attendance.” The point of the testimony is <u>not</u> that Mr. Fitzsimmons attended the meeting, but, in fact, that he did not, and was not invited to do so. As noted previously, this testimony is directly relevant to, impeaches, and contradicts Ecology’s claims to the Board during the trial.
42:15	51:24	The objections asserted during the deposition were immediately addressed. Ecology’s “spin” on the ten pages of the Director’s testimony which it now

attempts to delete is not accurate. The testimony reflects that Mr. Hellwig and Mr. Fitzsimmons had a private meeting which had as its main (if not sole) purpose synchronization of their recollections in preparation for their upcoming depositions, and is therefore relevant to the Board's evaluation of the truthfulness, accuracy, and completeness of the testimony given by both Mr. Hellwig and Director Fitzsimmons. Further, to the extent that objections were made in the course of this line of questioning, they were immediately addressed. For example, when an objection was made that Mr. Hellwig's testimony had been mischaracterized to Mr. Fitzsimmons, Mr. Fitzsimmons was provided the actual transcript of Mr. Hellwig's deposition testimony, asked to review the relevant portion, and then respond to a series of questions concerning it. *See, e.g., deposition at pp. 47, et seq.*

- 54:25 61:10 Ecology's broad-brush objection is not consistent with its claims to the Board concerning its decision-making process and the expertise applied. Ecology has argued in defense of its 401 that it was based on the Department's best available expertise and is entitled to deference on that basis. Having made the claim in testimony and argument, Ecology seeks to prevent the Board from reading testimony which contradicts its claims. Characterizing Director Fitzsimmons' testimony as "mental impressions on these subjects" is not a colorable objection. All witnesses testify as to their mental impressions. The "mental impressions" of the Director of the Department of Ecology as to the expertise of those involved in the 401 certification are relevant to Ecology's claims and arguments before the Board.
- 61:11 77:4 Here, again, Ecology offers no specific, colorable legal objection and, in the course of offering non-specific ones, mischaracterizes the substance of the actual 16 pages of testimony it seeks to exclude on a wholesale basis. Further, the characterizations of the testimony are so limited as to make them inaccurate. The Director's testimony in fact concerned the agreements reached with the Port for withdrawal of its 401 application in the fall of 2000 and, significantly, for the process which would be

followed in accepting and reviewing the subsequent 401 application (which ultimately resulted in the August 2001 certification). Ecology itself has touted that process, and the review team which participated in it, as a basis for Board deference and approval. Once again, ACC is entitled to provide the Board with relevant facts which contradict the spin which Ecology has placed on that process through testimony and exhibits.

77:5 84:3 Ecology's characterization of the contents of these pages is incomplete. Part of this testimony concerns withholding of a document based on a "deliberative" exemption, a position which Ecology ultimately withdrew, as Ecology's objection acknowledges. However, the greater part of the testimony to which Ecology objects concerns, once again, the nature of the process (which Ecology has touted) for review of the Port's new 401 application submitted in the fall of 2000. It concerns "commitments, agreements, and understanding coming out of a series of meetings with the Port" (p. 78, line 23 - p. 79, line 1), and then an exhibit which reflected a decision by Ecology to commence withholding of documents from public review.

84:4 98:13 Ecology here asks that the Board not review a full 14 pages of testimony which it acknowledges are relevant to the water right issue. The testimony here is directly relevant to testimony given by Ecology witnesses during the hearing on the water rights issue. Further, it provides impeachment for the testimony of Bob Barwin. While Mr. Barwin testified to different effect before the Board at trial, Mr. Fitzsimmons acknowledges in his deposition that Mr. Barwin actually took the position that a water right was required. Mr. Fitzsimmons further acknowledges -- without objection from his counsel -- that the Attorney General had also acknowledged the possibility that a water right was required. See pp. 95-98. Clearly, testimony is relevant which indicates that Ecology staff believed that a water right was required. This issue relates directly to reasonable assurance because it indicates that at least some of the agency's own experts thought a water right was needed, for example, to protect in-

stream flow augmentation required under the 401
from appropriation by others.

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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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

DEPOSITION UPON ORAL EXAMINATION
OF
THOMAS FITZSIMMONS

10:04 A.M.
JANUARY 18, 2002
2425 BRISTOL COURT SW
SECOND FLOOR
OLYMPIA, WASHINGTON

CARLA R. WALLAT, CRR, RPR, CCR #WALLACR346BE

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<p>1 APPEARANCES</p> <p>2</p> <p>3 FOR THE AIRPORT COMMUNITIES COALITION:</p> <p>4 PETER J. EGLICK</p> <p>5 and</p> <p>6 KEVIN L. STOCK</p> <p>7 Attorneys at Law</p> <p>8 Helsell Fetterman</p> <p>9 1325 Fourth Avenue, Suite 1500</p> <p>10 Seattle, Washington 98111-3846</p> <p>11</p> <p>12 FOR THE DEPARTMENT OF ECOLOGY:</p> <p>13 JOAN MARCHIORO</p> <p>14 Attorney at Law</p> <p>15 Assistant Attorney General</p> <p>16 2425 Bristol Court SW, 2nd Floor</p> <p>17 P.O. Box 40117</p> <p>18 Olympia, Washington 98504-0117</p> <p>19</p> <p>20 FOR THE PORT OF SEATTLE:</p> <p>21 JAY J. MANNING</p> <p>22 Marten Brown</p> <p>23 421 South Capitol Way, Suite 303</p> <p>24 Olympia, Washington 98501</p> <p>25 ALSO PRESENT: NONE</p>	<p>1 Requests for Production Nos. 1-6 to</p> <p>2 Department of Ecology and Responses</p> <p>3 Thereto</p> <p>4</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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<p>1 INDEX</p> <p>2 EXAMINATION BY: PAGE(S)</p> <p>3 MR. EGLICK 5</p> <p>4</p> <p>5 EXHIBITS FOR IDENTIFICATION PAGE</p> <p>6 165 E-mail dated 9/17/99, 7:26 AM from 28</p> <p>7 Hellwig to Fitzsimmons, Alkire;</p> <p>8 Subject: RE: Sea-tac Third Runway</p> <p>9 166 E-mail dated 5/11/2000, 4:48 PM from 29</p> <p>10 Hellwig to Luster, Ehlers, White, Hart,</p> <p>11 Groves, Pastore, Alkire; Subject: Meeting</p> <p>12 with Mic Dinsmore, POS, Wes Ulman, (PSRC?)</p> <p>13 and the Governor re SeaTac</p> <p>14 167 E-mail dated 5/19/2000, 1:10 PM from 39</p> <p>15 Hellwig to Fitzsimmons;</p> <p>16 Subject: SeaTac 3rd Runway</p> <p>17 168 Letter dated 9/28/2000 to Dinsmore 77</p> <p>18 from Fitzsimmons</p> <p>19 169 E-mail dated 10/3/2000, 7:29 AM from 79</p> <p>20 Hellwig to Fitzsimmons, Luster and Oliva;</p> <p>21 Subject: Public Disclosure Act Request</p> <p>22 170 E-mail dated 11/20/2000, 4:35 PM from 81</p> <p>23 Marchioro to Fitzsimmons;</p> <p>24 Subject: October 23, 2000 e-mail</p> <p>25 171 ACC's Interrogatories Nos. 1-18 and 84</p>	<p>1 OLYMPIA, WASHINGTON; JANUARY 18, 2002</p> <p>2 10:04 A.M.</p> <p>3 --oOo--</p> <p>4</p> <p>5 THOMAS FITZSIMMONS,</p> <p>6 sworn as a witness by the Notary</p> <p>7 Public, testified as follows:</p> <p>8</p> <p>9 EXAMINATION</p> <p>10</p> <p>11 BY MR. EGLICK:</p> <p>12 Q. Good morning, Mr. Fitzsimmons, I'm Peter</p> <p>13 Eglick and I'm one of the attorneys for the Airport</p> <p>14 Communities Coalition. Could you state and spell your</p> <p>15 full name for the record, please.</p> <p>16 A. Thomas, T-H-O-M-A-S, Craig, C-R-A-I-G,</p> <p>17 Fitzsimmons, F-I-T-Z-S-I-M-M-O-N-S.</p> <p>18 Q. And what's your address?</p> <p>19 A. In Tumwater, 5917 Prospector,</p> <p>20 P-R-O-S-P-E-C-T-O-R, Place Southwest.</p> <p>21 Q. When was the last time you spoke with Jay</p> <p>22 Manning about the airport project; do you know what I</p> <p>23 mean by the airport project?</p> <p>24 A. No, I don't. So why don't you describe it to</p> <p>25 me. If you're going to use that term, then we can</p>

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1 define. Go ahead.
 2 Q. Port of Seattle Third Runway Project.
 3 A. Anything related to it, is that embodied in
 4 that term?
 5 Q. Yes.
 6 A. I don't recall exactly.
 7 Q. No recollection of a conversation with Jay
 8 Manning about the Port of Seattle Third Runway Project?
 9 A. That's not what I said. You asked when is
 10 the last time I spoke to him. I answered I don't
 11 recall exactly, so.
 12 Q. Do you recall approximately?
 13 A. I'm having a hard time. I've had a number of
 14 conversations or been involved in a number of
 15 conversations with Jay over several years. So -- I'm
 16 not understanding. The last time I spoke to Jay
 17 Manning was yesterday. I spoke with Jay Manning weeks
 18 ago on shoreland management guidelines, I've spoken
 19 with Jay on other issues that he represents related to
 20 the Department. So I'm having a hard time thinking
 21 exactly the last time I had a conversation with Jay
 22 about the Third Runway Project. I'm sorry, I'm just
 23 answering truthfully.
 24 Q. Have you ever spoken with Jay Manning about
 25 the Port of Seattle Third Runway Project?

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1 A. Of course I have.
 2 Q. Okay. And who is Jay Manning?
 3 A. He is an attorney who is in private practice
 4 and I believe one of his clients is the Port of
 5 Seattle.
 6 Q. You believe it or you know it?
 7 A. I know it.
 8 Q. Okay. Have you ever had your deposition
 9 taken before?
 10 A. Yes, I have.
 11 Q. About how many times?
 12 A. Ten or twelve.
 13 Q. Okay. So you understand the procedure is
 14 that I ask you questions, you answer them under oath?
 15 A. I do understand that.
 16 Q. And you understand that if you don't
 17 understand the question, you let me know and I'll try
 18 to make it clearer to you.
 19 A. Yes, I do.
 20 Q. What's your position now in the Department of
 21 Ecology?
 22 A. I'm the director of the agency.
 23 Q. How long have you been director?
 24 A. As of yesterday, five years.
 25 Q. And what did you do prior to becoming

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1 director?
 2 A. I served as the governor's transition
 3 director between his position as King County executive
 4 and governor, which was about a three-month tour of
 5 duty.
 6 Q. And what did you do prior to that?
 7 A. I was the county administrator for Thurston
 8 County for a period of about 11 years.
 9 Q. And prior to that?
 10 A. I was the -- an assistant to the King County
 11 executive for a period of about six years.
 12 Q. And prior to that?
 13 A. I was the -- I worked at a residential
 14 treatment center for emotionally disturbed children and
 15 I was in private consulting.
 16 Q. Private consulting in what field?
 17 A. Government affairs, federal government Native
 18 American affairs.
 19 Q. Native American affairs in any particular
 20 aspect?
 21 A. Yeah, we had a contract with the federal
 22 government to provide training and technical assistance
 23 services to 32 tribes in Washington, Oregon, Idaho and
 24 Alaska.
 25 Q. What kind of services?

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1 A. A whole range of services, anything from
 2 legal to staff training, to accounting, to
 3 infrastructure development, to the development, as a
 4 specific example, the museum at Neah Bay on the
 5 cultural historical museum at Neah Bay was one of our
 6 projects.
 7 Q. That was one of your development projects?
 8 A. Uh-huh.
 9 Q. Now, what's your educational background?
 10 A. I have a college degree and I have a master's
 11 degree in public affairs.
 12 Q. And your college degree is in public affairs
 13 as well?
 14 A. No. My college degree is in biological
 15 sciences, you know, basic bachelor of arts degree -- or
 16 bachelor of science, excuse me.
 17 Q. And when did you get your bachelor's degree?
 18 A. 1972, I think.
 19 Q. And when did you get your master's degree?
 20 A. I'm not exactly sure. '73 -- three years
 21 later. So '75, '76, I'm not exactly sure of the date.
 22 Q. Now, did you say before you talked with Jay
 23 Manning several times about the Port of Seattle Third
 24 Runway Project?
 25 A. I'd like you to explain the question here,

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1 okay? I'm not trying to be resistant in answering the
 2 question. You're asking me did I talk to Jay Manning?
 3 Q. About the Port of Seattle Third Runway
 4 Project.
 5 A. I said on several occasions; in group
 6 settings, in problem solving issues. So again the
 7 inference here is that -- I'm having a hard time
 8 understanding. Do you mean a one-on-one conversation?
 9 Do you mean -- what does talk to Jay Manning mean?
 10 Q. Well, either one, in fact, but let's break it
 11 down if that's easier for you. Have you had any
 12 conversations with Jay Manning about the Port of
 13 Seattle Third Runway Project in which there were no
 14 other participants?
 15 A. I don't recall one. No, I don't.
 16 Q. Have you had any conversations with Jay
 17 Manning about the Port of Seattle Third Runway Project
 18 in which there was only one other participant other
 19 than you and Mr. Manning?
 20 A. Yes, to the best of my recollection, I
 21 believe one or maybe others, but I do recall one.
 22 Q. Now, did that conversation occur before or
 23 after Mr. Manning left the state's employ?
 24 A. The conversation I'm recollecting occurred
 25 afterwards.

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1 Q. Okay. Have you had any conversations with
 2 Mr. Manning with a group, individually, one
 3 participant, 100 participants, doesn't matter, have you
 4 had any conversations with Mr. Manning about the Port
 5 of Seattle Third Runway Project while he was in the
 6 state's employ? Do you know what I mean by "in the
 7 state's employ" by the way?
 8 A. Of course I do.
 9 Q. I'm referring to the fact he was the
 10 assistant attorney general responsible for the Ecology
 11 division, wasn't he?
 12 A. Yes.
 13 Q. Then go ahead, if you would, please, and
 14 answer the question.
 15 A. I can't answer the question with the kind of
 16 specificity I would like to. And please understand,
 17 I've been in this position five years. On a weekly
 18 basis I interact with attorney generals on numerous
 19 occasions, certainly on every Tuesday and Friday when
 20 we have meetings on issues and on legal cases, et
 21 cetera. So what you're asking me to do is think back
 22 five years ago and recall in my own mind without any
 23 opportunity to refresh my memory here if Jay was -- if
 24 we were dealing with the third runway during those
 25 meetings and if Jay was the representative during those

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1 meetings. And I just am uncertain. He may have been.
 2 That is a possibility.
 3 Q. When did you first become aware that Jay
 4 Manning was representing the Port of Seattle concerning
 5 the third runway?
 6 A. I think about a year and a half ago.
 7 Q. And when you became aware of that, did you
 8 perform an investigation to determine whether or not he
 9 had participated in any meetings with you, for example,
 10 concerning the Port of Seattle Third Runway?
 11 A. No, I did not.
 12 Q. Did you ask anyone else to?
 13 A. No, I did not.
 14 Q. Were you surprised in any way to see that the
 15 former head of Ecology's attorney general division was
 16 now in front of you representing a party that had been
 17 before the Department for several years?
 18 A. No, I was not.
 19 Q. You thought that was routine?
 20 A. I thought it -- for it to occur, I trusted
 21 that Mr. Manning, our attorneys, the attorney general's
 22 office and the ethics involved in practicing law would
 23 have all been considered and that it would have been
 24 perfectly appropriate for Jay to take on the
 25 responsibility that he did. And I made those

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1 assumptions based on several other experiences in my
 2 career where the same kinds of shifts have occurred and
 3 the same sorts of ethics have presented, if there was a
 4 conflict to be a conflict.
 5 Q. You say you made some assumptions; is that
 6 correct?
 7 A. Yes, I used that term.
 8 Q. Did you make any investigation to determine
 9 whether those assumptions were in fact warranted?
 10 A. I answered that. No, I did not.
 11 Q. Okay. It's true, isn't it, that the Port of
 12 Seattle has been seeking approval from Ecology for its
 13 Third Runway Project for a period of time that extends
 14 back into Mr. Manning's tenure as head of the Ecology
 15 division of the attorney general's office, isn't it?
 16 A. Not to nitpick, but just to sort of, in the
 17 beginning of our conversation here, let you know that
 18 I'm, if you haven't already experienced, wanting to
 19 understand your question here, not to resist and not to
 20 answer it, but I'm not willing to answer questions that
 21 have triple or quadruple meaning, okay? So let's just
 22 sort of walk our way through so I understand the
 23 question.
 24 It is true that the Department of Ecology has
 25 been reviewing a permit by the Port of Seattle for the

1 third runway. I don't consider that trying to get
2 approval out of the Department of Ecology. That may
3 have been their intention, that's not how I saw it. I
4 saw an objective review of a proposal. It is true that
5 the life of that project dipped back into before Jay
6 left the attorney general's office. Factually I think
7 that's probably very true. Beyond the facts, I'm not
8 sure I understand your question.

9 Q. Well, I think you just answered it.

10 Now, how long, to your knowledge, has the
11 issue of water rights been involved in the Port of
12 Seattle Third Runway application?

13 A. It probably dates back about a year, a year
14 and a half at the most.

15 Q. There were no issues concerning water rights
16 earlier than a year or a year and a half ago?

17 A. If there were, I was not aware of them.

18 Q. Well, maybe we can share something with you
19 that will shed light on that in a moment.

20 I know what I wanted to ask you. Have you
21 ever had any conversations with a Mr. Isaki concerning
22 the Port of Seattle Third Runway application?

23 A. Yes, I have.

24 Q. And who is Mr. Isaki?

25 A. He is currently a special assistant to the

1 special expertise, no.

2 Q. Does he have an environmental background?

3 A. Joe Dear has a regulatory agency background.

4 He was the director of L&I for the State of Washington
5 and then he was a deputy to the federal OSHA, whatever
6 that agency, before he became chief of staff.

7 Q. And L&I is what?

8 A. Labor & Industries.

9 Q. Okay. So it sounds like his background is in
10 regulations having to do with labor and workplace
11 conditions?

12 A. Yes. Regulation in general in workplace and
13 worker safety I guess in particular.

14 Q. And are there a lot of nexuses that you know
15 of between OSHA regulations and the Federal Clean Water
16 Act regulations?

17 A. No, not that I'm aware of, but I'm -- again,
18 you asked me if he has any special expertise and my
19 thought -- my answer was no, but he has some related
20 experience.

21 Q. Well, I guess in the Kevin Bacon sense
22 perhaps. Do you understand what I mean by that?

23 A. No, but --

24 Q. Okay. We'll explain it on a break.

25 A. If it's a question --

1 governor for business and -- business relations and
2 regulatory reform or some such title. I'm not exactly
3 sure of the title. When I had the conversations I just
4 answered yes to, he was the chief of staff to the
5 governor.

6 Q. And does he have some special expertise in
7 the Ecology administration of the 401 program?

8 A. No, I wouldn't suggest that he does.

9 Q. What's his first name?

10 A. Paul.

11 Q. Okay. And you say he was chief of staff for
12 the governor?

13 A. Yes.

14 Q. Now, I thought that was someone else named
15 Joe Dear?

16 A. Joe Dear left at about a year and a half ago,
17 January or so of the year 2001, I think. And Paul
18 Isaki was appointed chief of staff subsequent to that.

19 Q. So Paul Isaki is Joe Dear's successor of
20 chief of staff for the governor?

21 A. Yes.

22 Q. Now, Joe Dear, I have the same question for
23 you, does he have some special expertise in Ecology's
24 administration of the 401 program?

25 A. I wouldn't characterize it as him having

1 Q. Now, have you met recently with Gordon White
2 concerning the 401 Certification for the Port of
3 Seattle?

4 A. What do you mean by "recently"? Within the
5 last week; within the last month?

6 Q. Within the last week.

7 A. No, I have not.

8 Q. Okay. Have you met with him within the last
9 month, same question, concerning the 401 Certification?

10 A. Yes, I have. I had a discussion with him
11 about the status of the project.

12 Q. When was that?

13 A. Sometime within the last month. Maybe two
14 and a half weeks ago, three weeks ago, something like
15 that.

16 Q. Around the holidays?

17 A. Yeah, that's about right.

18 Q. And who else was involved in that discussion?

19 A. I think, to recalling, I think -- I think it
20 would be December 18th, I think is when I had the
21 discussion. And the reason I recall was that that's
22 the day I believe that the PCHB stay ruling came out.
23 And so he and I talked, I think Ron Schultz from the
24 governor's office may have been in the conversation
25 because it was about connecting the governor with

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1 understanding the decision and of course having us
 2 understand the decision as well. So the conversation
 3 was around the announcement.
 4 Q. What's Ron Schultz's position in the
 5 governor's office?
 6 A. He's a policy analyst for the governor.
 7 Q. Was it by phone or in person?
 8 A. I think -- well, I know Gordon was in person,
 9 Ron was in person. And now that I recall, the person
 10 on the phone was the governor's press secretary, Pierce
 11 something. I can't remember. I don't know his last
 12 name.
 13 Q. Is Pierce the first name?
 14 A. Yeah, I think.
 15 Q. What was the substance of the discussion?
 16 A. Did you hear the announcement? My legal
 17 counsel had left me a voice mail, so Gordon and I and
 18 Ron and then turned to phone by Pierce, so it was a
 19 substance around what the PCHB ruling was. I believe
 20 it was the 18th. I may be wrong, but I think it was
 21 the 18th of December. It was on the day the decision
 22 came out.
 23 Q. and were there any discussions about what
 24 Ecology would do in response to the decision?
 25 A. Yes. We said we needed to meet with legal

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1 counsel and decide what to do.
 2 Q. Has anyone from Ecology, to your knowledge,
 3 communicated with the Port about what actions would or
 4 would not be taken in response to the Board's stay
 5 decision?
 6 A. I believe our attorney has had conversations,
 7 if that falls within the anybody from Ecology question.
 8 I have not, and to the best of my knowledge, none of
 9 our staff have.
 10 Q. Has Ecology, to your knowledge, communicated
 11 to the Port that it should take no action in
 12 furtherance of the Third Runway Project in light of the
 13 Board's entry of a stay on the 401 Certification?
 14 A. I have no knowledge about what -- about that.
 15 If Ecology has, I'm not aware of it.
 16 Q. Well, as the director --
 17 A. Well, the director has not.
 18 Q. As the director on this high profile project,
 19 that's something you would likely have knowledge of,
 20 isn't it?
 21 A. Yes, I think so. Yeah. I mean, I should
 22 have knowledge of it, yes.
 23 Q. And as far as you know, Ecology has done
 24 nothing in response to the Port's stay with regard to
 25 telling the Port of Seattle not to pursue the Third

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1 Runway Project; is that right?
 2 A. Again, are you asking -- help me understand
 3 your question. Not to pursue the Third Runway Project.
 4 Are you meaning not to move dirt, not to proceed
 5 relative to the construction of the project, or are you
 6 meaning --
 7 Q. Those things.
 8 A. -- to drop the project and not to pursue it
 9 as a proposed project?
 10 Q. No, I think your clarification was very
 11 appropriate. And the first two things that you
 12 mentioned would be good examples of what I'm asking
 13 about: Dirt and construction.
 14 A. Yeah, I understand. I do not know if or if
 15 not communications to that effect have occurred. I am
 16 not aware of them. I assume not being aware of them
 17 would suggest we have not because it would be typical
 18 for me in this sort of a situation to be aware of that
 19 kind of communique.
 20 Q. And are you also aware of a decision which
 21 the Pollution Control Hearing Board issued a bit more
 22 recently concerning the major modification of the Port
 23 of Seattle's NPDES permit?
 24 A. I am aware of that.
 25 Q. And do you know what the decision essentially

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1 did?
 2 A. I believe I have an understanding of what the
 3 decision did, yes.
 4 Q. Why don't you explain that to me, if you
 5 would, please, your understanding?
 6 A. My understanding is that with the exception
 7 of the technical identification of the location of
 8 outfalls, the PCHB determined that Ecology's granting
 9 of a major modification was appropriate. That's my
 10 shorthand of it.
 11 Q. Well, is it your understanding that the PCHB
 12 said that the identification of outfalls was an
 13 inconsequential matter?
 14 A. Yeah, that's my impression of the decision,
 15 yes.
 16 Q. Have you read it?
 17 A. No, I have not.
 18 Q. Who told you that the identification of
 19 outfalls was inconsequential in terms of the PCHB's
 20 decision?
 21 MS. MARCHIORO: Objection, mischaracterizing
 22 the testimony of the witness.
 23 Q. (BY MR. EGLICK) Who gave you your impression
 24 of whether or not the identification of outfalls was
 25 consequential?

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1 A. I had a briefing of the results and
 2 interpretation of what the Board's decision was and I
 3 drew the conclusion from that information.
 4 MR. EGLICK: Could you read back the
 5 question, please.
 6 (Reporter read back as requested.)
 7 A. I did, that's what I just answered. I gave
 8 myself my own impression based on the information that
 9 I had gotten in terms of the report of the decision.
 10 Q. (BY MR. EGLICK) Did you brief yourself,
 11 Mr. Fitzsimmons?
 12 A. I drew my own conclusion that the decision by
 13 the PCHB, based on what I understand to be their
 14 decision, briefed by my counsel, I drew my own
 15 conclusion that the issue that we were found to err in
 16 was not a substantive issue, and on the whole the major
 17 modification that we granted was supported by the PCHB.
 18 Q. So you were briefed by your counsel; is that
 19 correct?
 20 A. Yes, I was.
 21 Q. And you have not read the decision; is that
 22 correct?
 23 A. I stated that. No, I have not.
 24 Q. Do you know whether or not the permit that
 25 was the subject of the appeal and the Board's decision

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1 was remanded or not?
 2 A. I believe it was remanded for the purposes
 3 that I've described my understanding here, that
 4 technically information had to be supplied in order for
 5 the permit to ultimately go forward.
 6 Q. Okay. Now, when you say identification of
 7 outfalls, what does that mean, to you?
 8 A. To me it means the specific location of where
 9 the stormwater effluent would be emitted into the
 10 environment, the outfall.
 11 Q. Discharged into a stream, for example?
 12 A. Precisely.
 13 Q. Now, as the director of the Department of
 14 Ecology, can you conceive of circumstances where
 15 knowledge of the location of an outfall would be
 16 important in terms of assessing compliance with water
 17 quality standards?
 18 A. Knowledge of where outfalls are to be located
 19 is important, but the precise specificity within feet,
 20 yards, oftentimes varies when it comes down to actually
 21 constructing it and varies in terms of the end result
 22 for whatever reason. And that range of specificity, I
 23 don't believe makes a significant -- it could
 24 potentially, but I believe, my understanding of our
 25 outfall plan here and the major modification permit,

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1 that the specific location of the outfalls in question
 2 are not significant to our choices around the effect of
 3 water quality.
 4 Q. And how were the outfalls in question
 5 identified by location in the permit and fact sheet
 6 that the Board has not remanded?
 7 A. I'm not -- I don't know for sure. I don't --
 8 can't answer the question because I don't -- other than
 9 I don't know.
 10 Q. Well, I got the impression you were saying
 11 that -- that from the permit that the Board has now
 12 remanded you could know within a few feet where an
 13 outfall was going to be located. Is that what you're
 14 saying?
 15 A. I don't believe that's what I said, and if I
 16 did, I mean -- if I left you with that impression I
 17 apologize. I was answering a question about, is the
 18 exact location of permits -- of outfalls in a permit,
 19 and I didn't know we were talking specifically about
 20 this permit. We were talking in general in terms of
 21 outfalls and their effect on water quality. And I said
 22 they can vary, they do vary, and that variation
 23 potential is taken into consideration as I've come to
 24 understand how our program people do work. That's the
 25 answer.

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1 Now, in terms of where exactly these were and
 2 what the -- your second question here, I don't know
 3 what variation there was, et cetera.
 4 Q. And have you, before deciding what position
 5 the Department is going to take as to whether the
 6 Board's decision on location of outfalls was technical
 7 is the word you used, have you set aside some time when
 8 you're going to actually look at the major modification
 9 that the Board has remanded and look at the Board's
 10 decision?
 11 A. No, I have not. I have been -- it has been
 12 suggested to me by our staff who I have great
 13 confidence in that this exact location of the outfalls
 14 is, in their view, not a significant issue and it's --
 15 that's -- on this particular permit, that's who I'm
 16 trusting to draw my conclusions from.
 17 Q. So you have no independent analysis, you're
 18 not planning on performing any yourself?
 19 A. I'm not, no.
 20 Q. Okay. And have you been given any -- strike
 21 that.
 22 Are you aware of any action the Department
 23 has taken to advise the Port of Seattle that in light
 24 of the remand of the NPDES major modification, the Port
 25 may not proceed once again with moving dirt,

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1 construction activities -- you're nodding yes, but I
 2 should finish or otherwise the question won't be
 3 recorded for the reporter -- or any activities that
 4 were taken in reliance on that NPDES major
 5 modification?
 6 A. I'm not aware of any instructions provided to
 7 the Port on what to do relative to this most recent
 8 decision by the PCHB. I am aware that our staff are
 9 thinking about it, I've been informed that there's some
 10 consideration in terms of what this means, what it
 11 means for the project, what it means for the
 12 Department, and I'm aware that that consideration is
 13 going on right now.
 14 Q. And who has informed you of that?
 15 A. Ray Hellwig, my regional director.
 16 Q. Who else?
 17 A. Nobody else.
 18 Q. Well, is it typical that when a permit is
 19 remanded, the Department doesn't take some action to
 20 halt activity proceeding on the strength of the
 21 remanded permit?
 22 You're taking some time here. Do you want me
 23 to reword the question or --
 24 A. No, I'm reflecting on the -- on my answer.
 25 The first step on any PCHB decision that the

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1 Department does is to step back and say, What should we
 2 do? The second step is then at usually a staff level
 3 to inform the project applicant what it is we are doing
 4 and what it is we expect them to do. So it is typical
 5 that after a PCHB decision or a Shoreline Hearings
 6 Board decision or a court decision that we do what
 7 we're doing right now on the major modification, and
 8 then it is typical to have some interaction with the
 9 project proponent, yes.
 10 Q. What do you understand Ecology is doing right
 11 now on the major modification?
 12 A. We are thinking about what to do.
 13 Q. And is there some time frame in which Ecology
 14 is going to come to a conclusion about what to do?
 15 A. There is no definite time frame that I'm
 16 aware of, no.
 17 Q. Has anyone from the governor's office called
 18 and said, We want you to set a definite time frame in
 19 which you will decide what to do about the major
 20 modification?
 21 A. Called whom?
 22 Q. You.
 23 A. Me. No.
 24 Q. Isn't it practice for the governor's office
 25 to make such requests with regard to issues concerning

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1 401 or 402 permits?
 2 A. No, it's not practice.
 3 Q. That doesn't happen?
 4 A. It has happened. There's a difference
 5 between it happening and it being practice.
 6 Q. What's the difference?
 7 A. One of regularity versus one of having been
 8 contacted or having already been informed about the
 9 significance of a 401 or a major modification permit,
 10 et cetera. So sometimes it happens, sometimes it
 11 doesn't, given the circumstances of the particular
 12 project.
 13 Q. So it's not regular practice, as you put it,
 14 for the governor's office to contact Ecology concerning
 15 the time frame for a 401 or 402 action; is that
 16 correct?
 17 A. That's correct. It is not regular practice.
 18 Q. Okay. I'd like to share with you some
 19 documents here. Start with this one.
 20 (Deposition Exhibit No. 165 was marked for
 21 identification.)
 22 (Mr. Stock left the proceedings.)
 23 Q. (BY MR. EGLICK) Showing you when's been
 24 marked as Exhibit 165, why don't you take a minute to
 25 look at it.

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1 A. (Witness reviewing document.)
 2 Q. Let me know when you're good to go.
 3 A. Okay.
 4 Q. Can I see that for a minute?
 5 First, I guess could you tell me who Carol
 6 Jolly is?
 7 A. In this context, she was a policy staff for
 8 the governor in the governor's policy office, and she
 9 is the deputy director of the governor's policy shop
 10 now.
 11 Q. And what about Mic Dinsmore, do you see him
 12 mentioned here?
 13 A. Yes, I do.
 14 Q. Who's he?
 15 A. He's the executive director of the Port of
 16 Seattle.
 17 (Deposition Exhibit No. 166 was marked for
 18 identification.)
 19 A. Okay. Do you have questions?
 20 Q. (BY MR. EGLICK) First, this is an e-mail you
 21 can see from Ray Hellwig to you dated May 11, 2000,
 22 4:48 p.m.; is that right?
 23 A. Uh-huh.
 24 Q. Pardon me?
 25 A. Yes, I'm sorry.

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1 Q. And do you recall this e-mail?
 2 A. I do now that I see it in front of me. I do
 3 recall it.
 4 Q. By the way, who's Nancy Groves?
 5 A. I think that's Ray's assistant in his office
 6 up in Seattle -- or in Bellevue.
 7 Q. Ray Hellwig?
 8 A. Ray Hellwig.
 9 Q. What about Diane Pastore?
 10 A. That's my assistant.
 11 Q. And Bill Alkire?
 12 A. Alkire. He is the legislative liaison for
 13 the Department of Ecology.
 14 Q. Okay. Who's Martha Choe?
 15 A. She is the director of the Office of Trade
 16 and Economic Development for the State of Washington.
 17 Q. So she's another department director?
 18 A. Precisely.
 19 Q. What role does that department have in 401
 20 Certifications?
 21 A. I could say none, other than being the agency
 22 represented or interested in economic development.
 23 They are a -- they have an interest and a role in
 24 assisting business and economic development activities
 25 in a general sense in a -- regulatory proceedings. So

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1 I would say that's the role they have. Watchful,
 2 supportive. Their mission is to support economic
 3 development. But in terms of authority or in terms of
 4 project review or technical assistance, they have no
 5 role.
 6 Q. Well, they had enough of a role, didn't they,
 7 according to this e-mail, to arrange a meeting between
 8 the head of the Port and the governor?
 9 A. And that's precisely a very appropriate role
 10 in the sense of their mission to assist in economic
 11 development, to assist business development and other
 12 related activities to the general economy of the state.
 13 In this case, obviously, it's appropriate for the
 14 agencies to be involved in a runway project that would
 15 have a lot to do with the capacity of the state to
 16 provide trade and to meet economic development
 17 objectives.
 18 Q. Which one of the state water quality
 19 standards that 401 Certifications are about is
 20 concerned with the factors you just mentioned?
 21 MR. MANNING: Objection, calls for a legal
 22 conclusion.
 23 Q. (BY MR. EGLICK) To your knowledge and
 24 understanding as director of the department that
 25 administers the state water quality standards.

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1 A. The water quality standards of the state are
 2 about protecting the water quality of the state.
 3 Q. Are there any regulations, standards or
 4 anything else that Ecology is supposed to consider on a
 5 Federal Clean Water Act 401 Certification that speak at
 6 all to the question of fostering economic development?
 7 MR. MANNING: Objection, calls for a legal
 8 conclusion.
 9 Q. (BY MR. EGLICK) To your knowledge as
 10 director of the state agency that administers the 401
 11 Certification program?
 12 A. My answer is that the water quality laws of
 13 the state, to my knowledge, are nested in a set of
 14 intentions and goals that also address consideration of
 15 the economy and the economic impact of those standards.
 16 And so in my view, they do connect, not as a mission,
 17 not as a standard, but they do connect and are nested
 18 in a statutory framework that does contain intentions
 19 and considerations associated with economics of the
 20 state.
 21 Q. So is there some particular water quality
 22 standard, for example, that you can point to that would
 23 bear out, in your view, the response you just gave?
 24 A. No, I don't believe there is a water quality
 25 standard, but I'm suggesting in answer to your previous

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1 question that those -- you asked the water quality laws
 2 of the state, unless I misunderstood your question, and
 3 the water quality laws of the state are nested in a
 4 whole series of laws, environmental and economic, and
 5 so they do contain consideration of economic concerns.
 6 Q. And was it your direction, then, to
 7 department personnel in reviewing the 401 Certification
 8 that it take into account "economic concerns" as you
 9 put it?
 10 A. No, it was not my direction.
 11 Q. So this is something that you have kept to
 12 yourself but not imparted to your staff, or your
 13 department personnel?
 14 A. I don't understand your question because the
 15 previous question was, do the laws of the state
 16 consider economic development, and my answer to that
 17 was yes. So please, help me understand now this
 18 question.
 19 Q. Actually, I think my question was whether
 20 there are any provisions that are of concern under a
 21 Clean Water Act Section 401 Certification that take
 22 into account at all economic development, as you
 23 referred to it, concerns.
 24 MR. MANNING: Objection, calls for a legal
 25 conclusion and asked and answered.

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1 A. I am not aware of specific provisions in the
 2 standards that guide the statutes that relate -- not
 3 relate -- specifically on a 401 Certification that
 4 statutorily require the agency to consider economic
 5 development in the -- in the review of a 401
 6 Certification.
 7 Q. (BY MR. EGLICK) So what --
 8 A. May I finish, though?
 9 Q. Oh, sure, go ahead.
 10 A. There are rules that the agency has adopted
 11 associated with that, and in many of those rule-making
 12 activities, they require a business impact assessment.
 13 And in that business impact assessment, we have to
 14 consider economic development. So it's not as clean a
 15 yes and no answer as, you know, I sense you're wanting
 16 me to provide to you by suggesting the answer in your
 17 question.
 18 Q. I'm actually asking for a clear answer,
 19 rather than a yes or no answer, Mr. Fitzsimmons. So
 20 I'll try again.
 21 The question is if -- and I think you've kind
 22 of said there are no water quality standards or other
 23 laws that are administered under the 401 program that
 24 have to do with economic development. But the question
 25 is, if you're saying there are somehow other

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1 regulations or laws that bring economic development
 2 factors to bear on a 401 Certification, were they
 3 brought to bear in this case?
 4 MR. MANNING: Objection, mischaracterizes the
 5 witness's prior testimony.
 6 Q. (BY MR. EGLICK) Go ahead and answer.
 7 A. This has lost its trail to me. So I don't
 8 know what the question is. I'd ask that you repeat a
 9 specific question and I will truly try and answer it.
 10 Q. Well, let's go back and ask another one.
 11 Is there anything that CTED, that's Martha
 12 Choe's agency --
 13 A. Yes.
 14 Q. -- has jurisdiction over or expertise in --
 15 are you with me so far?
 16 A. I am tracking you.
 17 Q. That has any bearing under the laws and
 18 regulations that govern a 401 Certification by the
 19 Department of Ecology?
 20 A. Yes, there is. And the answer is, the laws
 21 that govern 401 Certification require us to set and
 22 establish standards through rule-making processes.
 23 When we engage in a rule-making process, we are
 24 required by law to consider economic impact, especially
 25 small business impact, and I would suggest that the

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1 Department of Trade and Economic Development clearly
 2 has expertise related to small business impact.
 3 Q. So is it your testimony then that in making
 4 the 401 Certification decision for the Port of Seattle
 5 Third Runway Project, it was appropriate for the
 6 Department of Ecology to take into account economic
 7 development issues such as, I think you've just
 8 mentioned, business impact?
 9 A. The Department --
 10 Q. Would you like me to have the question read
 11 back?
 12 A. Please, go ahead.
 13 (Reporter read back as requested.)
 14 A. That's not my testimony.
 15 Q. (BY MR. EGLICK) Okay. Did Martha Choe or
 16 CTED have any -- or did Martha Choe or CTED have any
 17 expertise to offer in any topic area other than ones
 18 related to economic development with regard to a Port
 19 of Seattle 401 Certification?
 20 A. I don't believe so, no, she did not.
 21 (Deposition Exhibit No. 166 was marked for
 22 identification.)
 23 Q. (BY MR. EGLICK) Now, Exhibit 166 is about a
 24 proposed meeting, is it not, among Mic Dinsmore, the
 25 director of the Port; Martha Choe; the governor, that

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1 would be Governor Locke?
 2 A. Yes.
 3 Q. Wes Ulman, is that the former mayor of
 4 Seattle?
 5 A. By name, yes.
 6 Q. And works for a number of groups now; is that
 7 right?
 8 A. I believe that's the case. I don't have a
 9 lot of knowledge about it, but that's my impression.
 10 Q. Now, did the meeting referred to in this
 11 exhibit take place?
 12 A. I believe it did, but I'm not absolutely
 13 certain.
 14 Q. Did you attend it?
 15 A. No, I did not.
 16 Q. You weren't invited?
 17 A. To the best of my recollection, I wasn't
 18 invited, yes.
 19 Q. Do you see where Mr. Hellwig -- Mr. Hellwig
 20 is your regional director in the Northwest Regional
 21 Office?
 22 A. Yes.
 23 Q. Do you see where Mr. Hellwig in the second
 24 paragraph says he had conversations with Jerry O'Keefe?
 25 A. Yes.

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1 Q. Who is that?
 2 A. He is a staff member in our budget and policy
 3 shop at Department of Ecology.
 4 Q. Okay. By the way, do you see where it
 5 mentions the meeting is campaign related? Do you see
 6 that?
 7 A. Take me to where it says that, please.
 8 Q. First line, second paragraph.
 9 A. No, I don't see that. It says it's very
 10 likely the meeting is campaign related.
 11 Q. Do you have any reason to believe it wasn't?
 12 A. I think that was the question that's embodied
 13 in this memo, or at least the issue around this memo.
 14 It may have been, it may not have been. As I recall,
 15 part of this was whether it was or whether it wasn't,
 16 yes.
 17 Q. Whether it was or wasn't what?
 18 A. Campaign related.
 19 Q. And what campaign is that a reference to?
 20 A. The governor's reelection campaign.
 21 Q. Okay. And then Mr. Hellwig says that, But
 22 according to conversations, quote, the meeting agenda
 23 will probably include, quote, and then he goes on to
 24 describe some things the Port wants to tell the
 25 governor about the Third Runway Project.

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1 Do you see that?
 2 A. I do.
 3 Q. You're saying you didn't go to that meeting?
 4 A. No, to the best of my recollection, I didn't
 5 attend the meeting. I'm pretty certain I didn't.
 6 Q. So is it typical for the governor to conduct
 7 meetings about pending applications before the
 8 Department of Ecology without someone from the
 9 Department of Ecology being in attendance?
 10 A. No, I wouldn't say it's typical.
 11 (Deposition Exhibit No. 167 was marked for
 12 identification.)
 13 Q. (BY MR. EGLICK) Showing you what's been
 14 marked as Exhibit 167 to your deposition. Can you
 15 identify it?
 16 A. Yes. It's a memo from Mr. Hellwig to me
 17 dated May 19, 2000 at 1:10. And I would characterize
 18 it as an informational memo on time frames and issues
 19 related to the decisionmaking process of the SeaTac
 20 third runway.
 21 Q. Okay. It's actually an e-mail, isn't it?
 22 A. I'm sorry, it is an e-mail memo, yeah.
 23 Q. It's not cc'd to anyone else, is it; in other
 24 words, it's just from Ray Hellwig to you?
 25 A. Yes.

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1 Q. And you'll agree with me that it is, what,
 2 eight days after Exhibit 166?
 3 A. Yes, I would.
 4 Q. Okay. And Mr. Hellwig, if you could read --
 5 Mr. Fitzsimmons, if you could read Mr. Hellwig's first
 6 sentence into the record, I'd appreciate it, please.
 7 A. It reads, "Tom, the July '00 decisionmaking
 8 time frame is going to be tight for us, but we'll give
 9 it our best shot. It appears that the KC" -- I believe
 10 that means King County -- "review of the Port's
 11 stormwater management plan may require up to ten more
 12 weeks."
 13 Q. Now, Mr. Hellwig has sent you an e-mail in
 14 which he's commenting on, quote, the July 2000
 15 decisionmaking time frame, quote. Do you see that,
 16 what you just read?
 17 A. Yes, I do.
 18 Q. What's that a reference to? He seems to
 19 think you'll know because he doesn't explain it.
 20 A. Well, to the best of my recollection, he's
 21 referring to previous discussions, briefings that I had
 22 been in around time frames for making the decisions
 23 related to the third runway proposal.
 24 Q. Now, was this the July 2000 decisionmaking
 25 time frame something that was imposed as a result of a

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1 meeting that had taken place eight days earlier?
 2 A. I do not believe it was, no.
 3 Q. Well, is there a reason then on May 19th,
 4 that you know of, Mr. Hellwig has decided to write you
 5 an e-mail and say, The July time frame is going to be
 6 tight for us?
 7 A. Well, the July -- the May 11th memo says, "We
 8 are meeting with the Port of Seattle to discuss the
 9 status of several key issues and identify steps we need
 10 to make to resolve outstanding ones."
 11 My recollection is that that's about both
 12 substantive and time frames, and time frames during
 13 this and any project in decisionmaking are very
 14 critical to the applicant. The practice of Ecology is
 15 to try and commit to a series of time frames, realistic
 16 but also sensitive to applicants' need to know with
 17 time frame certainty.
 18 So I would not at all presume that some new
 19 commitment came out of the May 11th or the, whatever
 20 date the governor's meeting was, and if they did, I am
 21 not aware of them and had no conversations with the
 22 governor or anybody else about some new time frame. So
 23 I would suggest that it is a coincidence of words, not
 24 of fact.
 25 Q. Okay. Well, did you write back to

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1 Mr. Fitzsimmons -- excuse me, to Mr. Hellwig when you
 2 got this e-mail and said, What July time frame are you
 3 talking about?
 4 A. I don't recall doing so, no.
 5 Q. So you knew what July time frame he was
 6 talking about?
 7 A. I believed -- yes, I most likely did. And
 8 the July time frame was the time frame that we had on
 9 the table going into the -- likely going into whatever
 10 communications that occurred around the May 11th
 11 meeting -- or the Tuesday, May 16th meeting, I'm sorry.
 12 I'm looking at the date of the e-mail as opposed to,
 13 "the meeting will happen at 4 p.m. on Tuesday the
 14 16th."
 15 Q. By the way, have you talked with Mr. Hellwig
 16 about your deposition?
 17 A. I had -- no, I have not specifically talked
 18 to him about my deposition, the content of my
 19 deposition or the fact that it is occurring. He did
 20 ask me when it was occurring, and I've informed -- I
 21 informed him when it was occurring.
 22 Q. You had a meeting with him, didn't you?
 23 A. I had a meeting with him about, what, my
 24 deposition?
 25 Q. And his.

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1 A. I wouldn't characterize the meeting in those
 2 terms, no.
 3 Q. I'll just read you something, and if I need
 4 to, I can certainly put it in the record. This is from
 5 Mr. Hellwig's deposition. He's talking about a meeting
 6 with you shortly before Christmas, and I asked him what
 7 was the agenda for the meeting and he answered, quote,
 8 The agenda for the meeting with him -- that's you,
 9 Mr. Fitzsimmons -- was to briefly go over key areas of
 10 concern related to the runway decision to clarify for
 11 myself my own memory of events in part for purposes of
 12 this deposition, end quote.
 13 And that's Page 15, Lines 3 through 7.
 14 Do you want to take a look at that? I'll
 15 give you a copy of it if you want.
 16 A. No, you can provide it to me, but what you've
 17 read -- looking across the table, seeing you read a
 18 quote from a document, so if you want to hand it to me,
 19 that's fine.
 20 Q. Sure. It's Page 15 here, lines -- let's see,
 21 8 through --
 22 MS. MARCHIORO: Why don't we take a break.
 23 We've already been going about an hour. Give the court
 24 reporter a rest.
 25 (Recess taken.)

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1 Q. (BY MR. EGLICK) So Mr. Fitzsimmons, let me
 2 ask you again, did you meet with Ray Hellwig before
 3 Christmas or at any time concerning your deposition or
 4 his?
 5 A. I met with Ray Hellwig concerning -- the
 6 purpose of the meeting was not solely about his
 7 deposition. The fact and issues related to his
 8 deposition did come up during the meeting. I believe
 9 the previous question you asked me was did I meet with
 10 Ray Hellwig about my deposition, and I did not meet
 11 with Ray about my deposition. That's what I believe
 12 your previous question was.
 13 Q. I think actually the record will reflect what
 14 my previous question was.
 15 A. So maybe you could refresh me through the
 16 record then.
 17 Q. And I think I actually asked whether you met
 18 about your deposition or his. But be that as it may,
 19 we're very glad to have the facts out now.
 20 When did this meeting take place?
 21 A. Roughly sometime before Christmas, I think
 22 between Thanksgiving and Christmas if I recall
 23 correctly.
 24 Q. And was that in your office?
 25 A. Yes.

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1 Q. And was anyone else there?
 2 A. No.
 3 Q. Did you take any notes?
 4 A. I don't recall doing so. I may have, but I
 5 don't recall doing so.
 6 Q. Well, we've made disclosure requests, so I
 7 would expect that if there are some, we would be
 8 getting them and I hope you will look into that or your
 9 counsel will.
 10 A. Well, I suspect if I did make notes you have
 11 them, and -- because we pretty much always, if not
 12 every single time, disclose anything appropriate with
 13 disclosure requests. So I'm confident that if I took
 14 notes you would have them. I don't recall taking
 15 notes.
 16 Q. Now, who initiated the meeting?
 17 A. I think Ray may have initiated it, yes.
 18 Q. And he came down here from Bellevue for the
 19 meeting?
 20 A. No. I think he came down here for other
 21 meetings as well and we stole a few moments to talk
 22 about a range of issues. So -- he's usually down in
 23 Olympia at least once a week, if not more frequently.
 24 Q. So he came from Bellevue down here and in the
 25 course of the day that he spent down here he met with

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1 you privately; is that correct?
 2 A. Yes.
 3 Q. How long was the meeting?
 4 A. Half hour perhaps, as I recall.
 5 Q. And what were the topics discussed in the
 6 meeting?
 7 A. The status of the overall sort of progress of
 8 the case, the timing, when he expected his deposition,
 9 I don't recall at that point that I had mine scheduled
 10 yet. How staff were doing in terms of all the
 11 depositions, either pending or already having been
 12 taken, how it's affecting other workload and other
 13 permit activities.
 14 Let's see. I think there were a couple of
 15 other issues. There's -- that frankly I'm -- I think
 16 it's a personnel matter that I'm not able to share
 17 here, during the course of the conversation.
 18 Q. Now, I read you before and I'll just read you
 19 again, Mr. Hellwig said that the agenda for the
 20 meeting, quote, was to briefly go over key areas of
 21 concern related to the runway decision to clarify for
 22 myself my own memory of events, in part for purposes of
 23 this deposition, end quote.
 24 Do you disagree with that characterization?
 25 MS. MARCHIORO: I'm going to object from the

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1 standpoint I think the witness should be allowed to
 2 read the transcript and get the context in which
 3 Mr. Hellwig made those comments because my recollection
 4 of that is not the same, and I was at that deposition.
 5 MR. EGLICK: You're saying, Counsel, that
 6 that's not an accurate quote?
 7 MS. MARCHIORO: I'm not saying you're not
 8 quoting accurately. I'm saying that in the context
 9 that Mr. Hellwig also stated that he had a range of
 10 issues --
 11 MR. EGLICK: Counsel, don't testify.
 12 MS. MARCHIORO: You asked me a question.
 13 MR. EGLICK: No, I asked you whether it was
 14 an accurate quote. That's usually a yes or no
 15 question.
 16 MS. MARCHIORO: Not when you answer them.
 17 MR. EGLICK: I'm not answering questions
 18 here, Counsel, and you shouldn't be testifying here,
 19 Counsel.
 20 Q. (BY MR. EGLICK) Sure, let's do it your way,
 21 Mr. Fitzsimmons. Why don't you read into the record,
 22 if you would, this is from the deposition of Ray
 23 Hellwig, Page -- well, let's see. Start with Page 14,
 24 Line 25, and then read into the record through Page 15,
 25 Line 7 -- there's 14, Line 25, then it goes over here

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1 to Page 15, Line 7. I'd like you to read that into the
 2 record, please.
 3 A. "Q: Well, how did you happen to end up with
 4 a meeting with the director in his office?
 5 "A: I asked for it.
 6 "Q: And what was the agenda for the meeting?
 7 "A: The agenda for the meeting with him was
 8 to briefly go over key areas of concern related to the
 9 runway decision to clarify for myself my own memory of
 10 events, in part for the purposes of his" -- "of this
 11 deposition."
 12 Q. Thank you.
 13 Now, is that accurate?
 14 A. That's what the paper says.
 15 Q. Is Mr. Hellwig's characterization that you
 16 just read accurate?
 17 MR. MANNING: Objection. I don't know how
 18 this witness can testify as to what Ray Hellwig thought
 19 the purpose of the meeting was. Ray Hellwig explained
 20 to us what he thought the purpose of the meeting was.
 21 MR. EGLICK: Mr. Manning, you've been around
 22 long enough to know that that objection is wholly
 23 improper. You're smiling as if that's kind of a funny
 24 thing to do, but in fact it's a very unprofessional
 25 thing to do.

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1 MR. MANNING: What I find funny is that
 2 you're asking a witness to explain the purpose of a
 3 meeting from another person's perspective who has
 4 testified as to what he thought the purpose of the
 5 meeting was.
 6 MR. EGLICK: And the appropriate objection is
 7 about three words, not three paragraphs.
 8 MR. MANNING: I guess I'm not as skillful as
 9 you.
 10 A. I think the record --
 11 Q. (BY MR. EGLICK) Well, excuse me a minute,
 12 Mr. Fitzsimmons, because I think what I'll do is ask a
 13 question that perhaps will deal with the concern that
 14 your counsel -- or I guess it's your former counsel,
 15 has expressed, and that is, is Mr. Hellwig's
 16 description of the agenda an accurate description of
 17 what the agenda for the meeting actually was?
 18 A. From my perspective, no. And I testified
 19 what was covered in the meeting. A range of issues,
 20 one of which was his deposition. But other things were
 21 covered in the meeting and there wasn't a written
 22 agenda for the meeting. So if that's Ray's belief of
 23 the agenda, I can only testify to my belief of the --
 24 my understanding of the agenda, and it was other things
 25 than just the deposition.

1 Q. Were the subjects that he described that you
 2 read into the record subjects that were addressed in
 3 the meeting?
 4 A. Yes, they were.
 5 Q. Okay. So you've told us about lots of things
 6 that went on in addition to your recollection, but
 7 let's focus for a minute on what was said within the
 8 area that Mr. Hellwig described. What facts did you
 9 and he talk about relating to preparing for his
 10 deposition?
 11 A. My recollection -- the best of my
 12 recollection is that we talked about sequencing issues,
 13 when -- he wanted to recall, and it was helpful to me
 14 as well, to know when we met or when we talked about
 15 something or when -- timings of meetings and so forth.
 16 So we talked about timing as one topic.
 17 Q. Timing of what?
 18 A. Well, just timing of events, the sequence of
 19 events, when they occurred. We talked about his -- he
 20 shared with me his understanding of, and his reasoning
 21 of the decisions around the requirement, whether or not
 22 the stormwater mitigation plan required a water right,
 23 because that was an area that was in -- that evolved
 24 over time.
 25 He assured me again that he was very sorry

1 Mr. Hellwig that he requested, did Tom Luster get
 2 mentioned?
 3 A. Yes. Ray shared with me his knowledge of the
 4 fact that Tom Luster is a, apparently a witness for the
 5 plaintiff's case and he shared with me his frustration.
 6 Again, I'm just sharing with you the conversation and
 7 the topic of the meeting, how, to his knowledge in the
 8 case, Tom Luster's -- Ray's opinion of how Tom Luster's
 9 so-called expert testimony is just mischaracterized
 10 from his perspective.
 11 Q. And you said "so-called expert testimony."
 12 Are you saying that you don't consider Tom Luster an
 13 expert with regard to 401 Certifications? We're
 14 referring to Tom Luster who worked for the Department
 15 of Ecology for over a decade; isn't that right?
 16 A. Yes, we are.
 17 Q. And who was the Department's senior 401
 18 coordinator, isn't that right?
 19 A. Yes.
 20 Q. So when you used the term "so-called expert
 21 testimony" --
 22 A. I was referring to the characterization that
 23 Ray put on it.
 24 Q. Let me ask you what your characterization is
 25 then, now that we've kind of gotten that clarified.

1 that the attorney-client privilege document that he
 2 made a note in got out publicly and assured me that the
 3 opponents in this case were absolutely twisting the
 4 truth of that document and the truth of the event, and
 5 that he expressed quite a bit of frustration over that,
 6 how his integrity and meeting notes were being
 7 manipulated. That was a topic that we talked about.
 8 Q. In preparation for his deposition?
 9 A. It was a topic of the meeting. I don't know
 10 whether you could -- if you wish to characterize it as
 11 preparation. I wouldn't characterize it as that. I
 12 would talk about -- you know, the whole general topic,
 13 as I said, was we talked about other things than just
 14 his deposition, and that was one of the topics that
 15 came up.
 16 Q. Have you talked to him since his deposition
 17 was taken?
 18 A. No, I don't believe I have. I -- well, I
 19 take that back. I talked to him as recently as
 20 yesterday -- when was his deposition taken?
 21 Q. January 8th.
 22 A. Yes, I have. On several occasions --
 23 Q. Anything come up about this case?
 24 A. No.
 25 Q. Now, when you had the meeting with

1 Would you call Tom Luster an expert on 401
 2 Certifications?
 3 A. I would say that Tom's expert -- I mean, Tom
 4 Luster, I would characterize it as that he has some
 5 expertise related to Clean Water Act Certifications. I
 6 would not characterize him in any stretch of the
 7 imagination as having all the expertise needed to make
 8 a 401 decision.
 9 Q. Well, he was the Department's expert on 401
 10 Certification, wasn't he?
 11 A. I wouldn't call him that, no. He was the
 12 Department's coordinator on the 401 decisionmaking
 13 process. Big difference. Significantly big
 14 difference.
 15 Q. He was the Department's senior 401
 16 coordinator; is that correct?
 17 A. That's correct.
 18 Q. And he held the trainings for others in how
 19 to make 401 decisions; is that correct?
 20 A. He coordinated training related to the 401
 21 decisionmaking process. He did not, to the best of my
 22 knowledge, conduct training on the substantive and
 23 technical decisions because there are far many more
 24 people in the agency who we rely on to make those
 25 technical decisions within their expertise that Tom

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1 Luster does not -- perhaps now he does -- did not then
 2 have.
 3 Q. Okay. And what was Tom Luster's expertise,
 4 to your knowledge? Are you familiar with his resume?
 5 A. I think -- I'm not familiar with his
 6 resume -- that's the answer to your second question --
 7 in any specificity. I'm familiar with his job, the
 8 assignment according to his job.
 9 Q. Well, who has more expertise, Tom Luster or
 10 Ray Hellwig on 401 Certifications?
 11 A. That's a value judgment I can't make.
 12 Q. Well, you just made a value judgment
 13 concerning Tom Luster's expertise vis-a-vis others who
 14 you couldn't even name. I'm now asking you to make a
 15 judgment naming another person and I'm asking you to
 16 apply that judgment you just made in a specific
 17 circumstance.
 18 A. In answer to your question, I would say that
 19 Ray has a number of expertise related to 401
 20 decisionmaking in terms of processes, in terms of the
 21 legal aspects of public information and public
 22 participation, and Tom Luster has a number of expertise
 23 related to the processes, et cetera. So it's hard for
 24 me to say one has more expertise than another.
 25 Q. What are Ray Hellwig's qualifications for

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1 making a 401 Certification decision to your knowledge,
 2 other than that he is director of the Northwest
 3 Regional Office of the Department of Ecology?
 4 A. Well, he also worked in the environmental
 5 programs for a number of years and was involved in a
 6 number of permitting activities. So he clearly has
 7 expertise in environmental regulatory decisionmaking,
 8 regulatory enforcement. He clearly has experience and
 9 knowledge in science and data, in analysis, all of
 10 which bear on making 401 decisions as well as other
 11 decisions.
 12 Q. What's Ray Hellwig's experience in science
 13 and data and analysis?
 14 A. I don't recall exactly how many years Ray has
 15 worked for the Department, but it's been a number of
 16 years, and in and out of a number of programs,
 17 including shoreland program, riparian zone issues,
 18 streamside management issues, exposure to those issues
 19 and involvement in those issues.
 20 Q. Have you ever actually reviewed what
 21 positions he held and what tasks he performed prior to
 22 becoming director of the Northwest Regional Office?
 23 A. I hired Ray Hellwig. I made the choice of
 24 appointing Ray Hellwig based on a very competitive
 25 process, and in that process I became very familiar

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1 with Ray's expertise.
 2 Q. Okay. So can you tell me what his higher
 3 education degrees are in?
 4 A. Off the top of my head, I can't. I mean -- I
 5 don't recall what they are.
 6 Q. And you're aware, aren't you, that for years
 7 after achieving his degree, he was involved in
 8 budgetary matters as his occupation? Are you aware of
 9 that?
 10 A. I'm fully aware of that, of course.
 11 Q. And in fact, Ray Hellwig has no scientific
 12 expertise in any environmental science, does he?
 13 A. Are you asking my opinion of whether Ray has
 14 science expertise or are you asking me to answer and
 15 affirm the opinion you just provided in the question?
 16 Q. Well, I'm asking you whether, in your
 17 opinion, Ray Hellwig has any scientific expertise in
 18 any area of environmental science. And my next
 19 question after that will be for you to give me the
 20 basis for that.
 21 A. In my opinion, Ray does have scientific
 22 expertise, expertise gained through his positions in
 23 the Department of Ecology, and possibly, although I
 24 don't recall explicitly, in his undergraduate course
 25 work and his previous job experience.

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1 Q. Has he ever had any training since he's come
 2 to the Department of Ecology in any area of scientific
 3 or environmental review or analysis?
 4 A. I don't know. I don't know.
 5 Q. Would it surprise you to know that he
 6 testified in his deposition that he had less than a day
 7 of training in anything of that sort?
 8 A. If that's what he testified, that's what he
 9 testified. I'm not surprised or unsurprised by it.
 10 I think -- you asked me my opinion, I gave you my
 11 opinion. I believe Ray Hellwig has scientific
 12 expertise in environmental decisionmaking, in
 13 permitting. Does he have expertise compared to others?
 14 Probably not. I simply asked a question to the best of
 15 my ability.
 16 Q. And you did say earlier that you hired him as
 17 director of the Northwest Regional Office and were very
 18 familiar with his qualifications, didn't you?
 19 A. During the hiring process I became very
 20 familiar with his qualifications, yes. Yes, I did.
 21 Q. But you're just not recalling them now; is
 22 that it?
 23 A. That's it, yes.
 24 Q. Okay.
 25 A. You asked me what his degree is in and I -- I

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1 mean, I don't recall exactly what his degree is in, but
 2 I, at one point a number of years ago, got very
 3 familiar with Ray and his background and his expertise
 4 and hired him based on that background and knowledge.
 5 Q. Now, back to this meeting with Mr. Hellwig,
 6 did you talk about -- you talked about date sequencing
 7 I think you said; is that right?
 8 A. Yes, I think so. Yeah, event sequencing.
 9 Q. Event sequencing. So did any discussion at
 10 that meeting have to do with the sequence of events
 11 surrounding Tom Luster's removal from the 401
 12 Certification application by the Port of Seattle?
 13 A. It's not possible to have had that discussion
 14 as you characterize it because Tom Luster was not
 15 "removed," as you've characterized it.
 16 Q. So your testimony is that Tom Luster was not
 17 removed from the 401 Certification application for the
 18 Port of Seattle?
 19 A. That is my testimony.
 20 Q. Would you prefer "transferred" as the verb in
 21 that question?
 22 A. That is more akin to the fact that at one day
 23 he was working on the project and whatever time went on
 24 he moved on to other work. And the reason it's more
 25 characteristic of it is because it is a neutral term

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1 and relative to what happened to him, and his
 2 reassignment of duties was a neutral activity related
 3 to the 401 and the Port project, et cetera.
 4 Q. Was he reassigned?
 5 A. Are you asking a yes or no question to the
 6 term "reassigned"?
 7 Q. Yes.
 8 A. No. I would say no, he was not "reassigned."
 9 Q. So if there are Department documents not
 10 generated by Mr. Luster but by others in the Department
 11 that used the term "reassigned," then you're taking
 12 issue with the use of that term?
 13 A. Your use of the term -- perhaps I need some
 14 explanation of your use of the term.
 15 Q. Why don't you tell me what you think
 16 "reassigned" means.
 17 A. It denotes to me that with some purpose of
 18 intent, he was taken off of one activity and reassigned
 19 to another activity. His assignments changed and in
 20 the context of anticipated changing assignments, so if
 21 that's what is meant by the term, he took on new
 22 assignments, he was assigned or -- from one to another
 23 set of activities.
 24 Q. And the set of activities that he was
 25 assigned from was the Port of Seattle 401 application;

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1 is that correct?
 2 A. From -- yes, that's correct.
 3 Q. Now, back to what my original question was
 4 before we had to clarify whether he was removed,
 5 transferred, reassigned or just assigned from one thing
 6 to another, and that question was, was that topic, in
 7 any form, using any of those verbs, discussed in your
 8 meeting with Mr. Hellwig?
 9 A. Yes, it was.
 10 Q. And why would Ray Hellwig discuss that with
 11 you?
 12 A. Well, I think it's a very logical issue
 13 because during the permitting process, I had had
 14 several contacts by legislators, I had had a contact by
 15 Tom Luster himself via a phone mail -- voice mail
 16 rather -- about his assignments and his duties, and so
 17 I had personal involvement in the series of events over
 18 the course of time that related to Tom Luster.
 19 Q. Related to Tom Luster in general or related
 20 to Tom Luster's ultimate assignment from, as you put
 21 it, the SeaTac third runway application to, as you put
 22 it, other duties?
 23 A. I'm sorry, I got lost in the question. I was
 24 paying more attention to how much fun you were having
 25 asking it, to tell you the truth, by the smirk on your

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1 face. I really don't know the question, Peter. Would
 2 you ask it again?
 3 Q. I'm not aware that I'm smirking, I'm actually
 4 kind of sitting here trying to suppress a cough which I
 5 have --
 6 MR. EGLICK: But go ahead, court reporter, if
 7 you would, please, read back the question.
 8 (Reporter read back as requested.)
 9 A. I'd say related to Tom -- my answer is
 10 related to Tom Luster in general.
 11 Q. (BY MR. EGLICK) Now, what did you discuss
 12 about Tom Luster in general with Mr. Hellwig?
 13 A. I recall him telling me where Tom Luster now
 14 is employed. I recall him talking about the status of
 15 his knowledge of Tom Luster as, as we had talked about
 16 in this deposition previously, an expert witness for
 17 the plaintiffs. I recall Ray making remarks that, The
 18 plaintiffs are trying to make this out to sound like we
 19 removed Tom Luster from his job.
 20 I, of course, was familiar with those charges
 21 because legislators had made them and others had made
 22 them, and I said -- you know, This is not true. They
 23 can say what they want to, they can spin it out to be
 24 what they want to, but it's just not true that Tom --
 25 and so we talked about those issues.

1 We talked about --
 2 Q. Well, let me interrupt you for a minute. You
 3 said, We talked about those issues. You mean about the
 4 issues of whether Tom was removed from his job?
 5 A. Yes.
 6 Q. Okay. Now, were you aware before Tom's --
 7 and you've now used the term "removal," but I'll use
 8 yours, "reassignment." Were you aware of Tom's
 9 reassignment before it occurred?
 10 A. Yes, I was. Yes, I was.
 11 Q. And were you aware of it from Ray Hellwig?
 12 A. I believe I had conversations both with Ray
 13 Hellwig and with Gordon White on the subject. And
 14 Gordon White, in case you're going to ask it --
 15 Q. I wasn't going to ask anything, I'm just
 16 taking a cough drop.
 17 A. So from Ray Hellwig as one, and in addition,
 18 Gordon White.
 19 Q. Had you received complaints from Mic Dinsmore
 20 concerning Tom Luster's performance on the 401
 21 Certification application review? Mic Dinsmore is the
 22 guy you said is the executive director of the Port of
 23 Seattle, right?
 24 A. Yes. And the answer from Mic Dinsmore, no.
 25 Q. From anyone affiliated with the Port of

1 Q. Now, you said having regular meetings with
 2 Gina Marie Lindsey did you say?
 3 A. Yeah. I wouldn't call them regular, but I
 4 would call them frequently enough to be not any date
 5 certain, but four or five meetings during the course of
 6 a year and then in the last year of the project review,
 7 probably once a month or so. Either meetings or
 8 telephone calls, I'm sorry, I don't mean to imply that
 9 they were all in person, but contacts is probably a
 10 better way to say it.
 11 Q. And who attended those meetings?
 12 A. Sometimes her staff, Elizabeth Leavitt.
 13 Michael Cheyne, I think is his name. And Port staff --
 14 Q. These are two Port persons, Elizabeth Leavitt
 15 and Michael Cheyne, C-H-E-Y-N-E?
 16 A. Is that how you spell it?
 17 Q. And Leavitt is L-E-A-V-I-T-T?
 18 A. And then Ray Hellwig. On occasion, one of
 19 our staff related perhaps to a particular issue. John
 20 Glenn, for example, I recall one meeting where the
 21 issue was the major modification and the time frames
 22 and processes around that --
 23 Q. Did the Port -- anyone affiliated with the
 24 Port in any way request, suggest that Mr. Luster be, to
 25 use your term, "reassigned"?

1 Seattle?
 2 A. Yes. I had been in conversations where
 3 people raised concerns about the objectivity of Tom
 4 Luster in carrying out his job.
 5 Q. Now, how would you happen to be in a
 6 conversation with the Port of Seattle where Tom
 7 Luster's activities at all would come up? What
 8 circumstances did you have those conversations?
 9 A. Periodic meetings that I had with the Port of
 10 Seattle airport manager.
 11 Q. Who's that?
 12 A. I'm trying to think of her name.
 13 Q. Gina Marie Lindsey?
 14 A. Gina Marie Lindsey, thank you. Over the
 15 course of the year or two that -- in the latter year or
 16 two of the activities related to the review of their
 17 proposed project, and in the course of those meetings
 18 which we would periodically hold to talk about issues,
 19 progress, concerns, or in some cases that I would
 20 engage in as support to a decision or a recommendation
 21 we were making to the Port, periodically during those
 22 meetings the subjects -- lots of subjects obviously
 23 came up, but the subject of their concern for the
 24 objectivity of our staff in general and Tom Luster in
 25 particular.

1 A. Request, no. Suggest, no.
 2 Q. Did they make suggestions that would have
 3 resulted in Mr. Luster, if they had been followed, no
 4 longer reviewing their project?
 5 A. They expressed their concerns about the
 6 objectivity of Tom Luster over a period of time.
 7 Similarly, at the same level as the -- as a group of
 8 several opponents of the project expressed their
 9 adamancy that Tom Luster is the only person in the
 10 Department of Ecology that has any objectivity on this
 11 project. And in that context, I -- that's the context
 12 in which these issues were coming to my attention.
 13 Q. And that was in the same time frame, is your
 14 recollection, as the Port was asking for, or suggesting
 15 Tom's -- Tom Luster's removal --
 16 A. I just answered the question. The Port did
 17 not suggest his removal. The Port expressed their
 18 concerns about his objectivity.
 19 Q. Okay.
 20 A. And my best recollection is that never went
 21 to the level of them saying, Remove him from the
 22 project. But, yes, it was at the same time opponents
 23 to the project were in writing and in telephone calls
 24 orally, legislators and citizens and elected officials
 25 in the local communities, expressing very strongly that

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1 Tom Luster is the only person in the Department of
 2 Ecology with objectivity.
 3 Q. And those letters then would be part of the
 4 record if such letters were sent prior to Mr. Luster's
 5 reassignment; is that correct?
 6 A. Yes, they should be.
 7 Q. Okay. So if they're in the record, they're
 8 there, and if they're not, then perhaps you've gotten
 9 your sequencing wrong, would that be possible?
 10 A. If they're in the record, they're there. I
 11 don't understand the sequencing comment.
 12 Q. Well, I guess it comes from the fact that my
 13 review of the record I guess reflects that the concern
 14 about Mr. Luster was something that came up from the
 15 public after he was reassigned and that you're kind of
 16 putting two things together that didn't happen at the
 17 same time. But that's fine, this is your deposition,
 18 not mine.
 19 A. It's mine, and I also recall that there were
 20 telephone calls prior to his change in assignment.
 21 Q. Now, you're smiling and kind of laughing as
 22 you say that. Is there a reason for that?
 23 A. Yes. The same reason you were, because you
 24 have continually used the term "reassigned," "removed,"
 25 and I'm trying to communicate that he was not removed,

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1 he was not reassigned, he had a change in assignment.
 2 And the smile you saw on my face is that in my own head
 3 I've just arrived at a term that better represents the
 4 terms you're suggesting and more accurately reflects my
 5 understanding of the situation.
 6 Q. I'm not suggesting any terms. I'm happy to
 7 use your change in assignment --
 8 A. Yes, he had a change in assignment.
 9 Q. -- and with all the meanings that you want to
 10 assign to it.
 11 Now, let me ask you a question then. You're
 12 saying that you had these regular meetings with Gina
 13 Marie Lindsey and Tom Luster's objectivity was
 14 questioned, but he wasn't removed -- excuse me, his
 15 assignment wasn't changed, was it, until after the Port
 16 withdrew its 401 application in the fall of 2000; isn't
 17 that correct?
 18 A. That is correct. Yes, that is correct.
 19 Q. Now, before -- or right around the time that
 20 withdrawal occurred, you had another meeting with the
 21 Port, didn't you?
 22 A. Yes.
 23 Q. And that was down at the Port's offices on
 24 the pier, wasn't it?
 25 A. Yes, that's correct.

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1 Q. And Mic Dinsmore was there?
 2 A. Yes.
 3 Q. He flew in from Europe for that meeting?
 4 A. I'm not sure that that's the meeting he flew
 5 in from Europe. It may be.
 6 Q. You had more than one meeting with him down
 7 at the pier?
 8 A. Yes. Yeah, there were, I think, two meetings
 9 with him down at the pier --
 10 Q. Okay.
 11 A. -- if I recall.
 12 Q. And at those two meetings -- now, these are
 13 meetings that took place just prior to the withdrawal
 14 of the Port 401 application?
 15 A. Yes.
 16 Q. At those two meetings, were there any
 17 requests, suggestions from the Port concerning
 18 reassignment of Mr. Luster -- change in assignment of
 19 Mr. Luster, excuse me?
 20 A. There were expressions of -- the similar
 21 expressions of concern as in past about Mr. Luster's
 22 objectivity.
 23 Q. And you were at the same time, weren't you,
 24 negotiating whether or not the Port would withdraw its
 25 401 application or whether you would have to issue a

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1 denial; isn't that correct?
 2 A. I wouldn't use the term "negotiating." I
 3 would say that we were -- we informed the Port -- I
 4 informed the Port that it was the agency's decision to
 5 deny the 401 Certification. And that they had options.
 6 And one option was to withdraw and resubmit, another
 7 option was to take the denial and appeal it or take the
 8 denial and stop the project. I wouldn't characterize
 9 that we were negotiating over anything.
 10 Q. You were laying out options; is that correct?
 11 A. That's correct.
 12 Q. And the Port was responding to your laying
 13 out of options; is that correct?
 14 A. That's correct.
 15 Q. And then you responded to the Port's
 16 response; is that correct?
 17 A. Yes.
 18 Q. And then they responded back to you; is that
 19 correct?
 20 A. Yes.
 21 Q. Okay. And there were a few rounds of that;
 22 isn't that right?
 23 A. Yes.
 24 Q. And there were some drafts of documents
 25 exchanged, weren't there?

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1 A. Yes, there were. Yes.
 2 Q. And at any time in the course of this process
 3 that we just described or in any conversations or
 4 exchanges or communications related to it, did the
 5 subject come up in any way of reassignment of
 6 Mr. Luster -- change in assignment of Mr. Luster,
 7 excuse me again?
 8 A. Yes, it did. It came up in the context of a
 9 discussion, as I recall the timing of it, the Port made
 10 the decision to withdraw their application. And then
 11 we subsequently, whether it was a subsequent meeting,
 12 we talked about given that, then what is the next step,
 13 and they wanted to resubmit the application. And we
 14 talked about how hard staff had worked, how staff
 15 assignments had been devoted almost in the last year
 16 exclusively to the Third Runway Project. We talked
 17 about changing the composition of the staffing patterns
 18 so that we could free backup thinking about, you know,
 19 sort of get out of the tension and recommit in a very
 20 positive way and renew it.
 21 At that point in time I was -- it was either
 22 there or shortly thereafter, but I think it was there,
 23 I was aware that there was a whole series of activities
 24 that Tom Luster was not doing, that he had been
 25 scheduled to get to do a long time ago. And I don't

1 Q. So th
 2 these discus
 3 particular
 4 assignm
 5 A.
 6 Q.
 7 discussion,
 8 people, by elect
 9 means, exchanged thou
 10 change of assignment for 10.
 11 A. No.
 12 Q. Then, I guess I'm going to have .
 13 and ask you the question I asked that you
 14 "Yes, it did," to and ask that again.
 15 A. Please, go back and do that.
 16 (Reporter read back as requested.)
 17 Q. (BY MR. EGLICK) Now, that w
 18 that related to --
 19 A. Something different than what yo
 20 me.
 21 Q. No, I don't think so --
 22 A. Well, then why don't we let the r
 23 back and ask the question and then I'll ar
 24 Q. Why don't we clarify it by asking
 25 question and --

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1 believe I made any disclosure about or commitment to
 2 change Tom Luster. My recollection was I said we
 3 would, at Ecology, go back and make determinations
 4 about staff assignments and reconstitute a team to go
 5 to the next step on this.
 6 MR. EGLICK: Now, Mr. Fitzsimmons, I know
 7 you're concerned about time and I'm going to ask the
 8 reporter to read back the question again. If you
 9 would, please, Reporter.
 10 (Reporter read back as requested.)
 11 (Discussion off the record.)
 12 Q. (BY MR. EGLICK) We'll go on from there. But
 13 what I wanted to point out to you, Mr. Fitzsimmons, is
 14 I asked a question, you answered it with, "Yes, it
 15 did," and then you went on to 22 lines of things I
 16 hadn't asked about, but I might ask about in some way,
 17 but if you're concerned about time, and you've said you
 18 are, it's really your choice how you want to proceed.
 19 I'll go to the next question.
 20 All of the discussions and whatever you just
 21 described took place where?
 22 A. A variety of places.
 23 Q. And were any of those places in locations
 24 where Port of Seattle representatives were present?
 25 A. Yes.

1 A. Then -- what question am I --
 2 Q. Excuse me, Mr. Fitzsimmons. It
 3 better if we talk one at a time and I ask t
 4 and your attorney makes the objections.
 5 sense in getting hot under the collar.
 6 MS. MARCHIORO: Well, and I
 7 that you asked -- at the beginning of the
 8 you instructed Mr. Fitzsimmons to let yo
 9 didn't understand the question. I think y
 10 up some questions on him and he's tryin
 11 explained. So if you would please do th
 12 appreciate it.
 13 MR. EGLICK: Sure. I'd be happ
 14 did invite him to let me know if he didn'
 15 the question. I didn't mean to invite him
 16 angry.
 17 MS. MARCHIORO: Objection, I
 18 mischaracterizes Mr. Fitzsimmons' state
 19 MR. EGLICK: Well, I'm not pret
 20 his state of mind. I'm wondering what h
 21 Q. (BY MR. EGLICK) In any ever
 22 move on here, folks.
 23 The question is, you were describ
 24 of interaction with the Port and what I n
 25 and maybe the question wasn't clear, wa

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1 interaction, that process that you described of the
 2 Port and you exchanging thoughts and drafts of
 3 documents and so on, did the change in assignment for
 4 Tom Luster come up?
 5 Now, does that work for you as a clear
 6 question?
 7 A. No, it does not.
 8 Q. Can you pinpoint for me which part's unclear
 9 and I will do my darndest to fix it?
 10 A. When you ask, did the change of assignment --
 11 in assignment to -- of Tom Luster come up, I am really
 12 trying to answer the question. I've been in many
 13 depositions. I am an honest person, but I'm also
 14 sensitive when words can be used differently than what
 15 I mean them to use. So that's what this is really
 16 about.
 17 Q. Well, tell me which words you're concerned
 18 about and we'll fix it.
 19 A. The "change of assignment." We talked about,
 20 to the best of my recollection, the team of people on
 21 both sides. That was my previous answer.
 22 Q. And we is who?
 23 A. The Port of Seattle staff, Ray and I were in
 24 a meeting where, as I tried to describe earlier, we
 25 talked about, okay, if they're going to resubmit, then

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1 let's talk about constitution of the teams of people
 2 and the processes associated with that, et cetera.
 3 Q. So you talked with the Port of Seattle -- the
 4 way you would like to phrase it to make it clearer is
 5 that you talked -- you had discussions that involved
 6 the Port of Seattle concerning the composition of the
 7 review team if the Port were to submit -- withdraw and
 8 submit a new application?
 9 A. Thank you, that is characterizing it. We did
 10 not specifically talk about whether Tom Luster would
 11 be -- what his assignment would be on that review team.
 12 They expressed their concerns about Tom Luster. We
 13 expressed our concerns about some of their staff and
 14 how the staff were working together and how the staff
 15 had, for the past year been under an incredible amount
 16 of tension. And we said we would take their concerns
 17 into heart, under consideration.
 18 And then what I tried to describe previously,
 19 separate from this meeting with the Port, which you I
 20 understood previously, suggested it was with the
 21 meeting with the Port, my staff and I talked about,
 22 among other things related to the staff team, the
 23 assignments of Tom Luster.
 24 Q. And the question that you talked about was
 25 whether Tom would be on this new review team if the

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1 Port resubmitted or whether he would have a change in
 2 assignment?
 3 A. And if Tom were, what other duties of Tom's
 4 were not happening and what are the pros and cons of
 5 constituting -- reconstituting the team differently.
 6 That whole range of issues, yes, we did talk about
 7 that.
 8 Q. Okay. And then after those discussions were
 9 concluded, at some point you and the Port reached
 10 agreement on the Port's withdrawal of its 401
 11 application and resubmission of a new one; is that
 12 correct?
 13 A. I think they had reached a decision to
 14 withdraw, so the agreement wasn't whether or not they
 15 were withdrawing. Maybe I misunderstood your question.
 16 Reached agreement on the withdrawal implies to me that
 17 they hadn't decided to withdraw until after these
 18 discussions. They had decided to withdraw before the
 19 discussions I just described.
 20 Q. They hadn't formalized the withdrawal,
 21 though, had they?
 22 A. No, they had not, that's correct.
 23 Q. Okay. Well, that's helpful. And I really do
 24 apologize, because we could have saved a lot of time --
 25 and that's my responsibility as well as yours, if you

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1 had wanted to offer the word "composition," I would
 2 have been happy to accept it. So just let me know as
 3 soon as you have what works better for you as a synonym
 4 and maybe we can run with it.
 5 MS. MARCHIORO: Off the record.
 6 (Discussion off the record.)
 7 MR. EGLICK: Back on.
 8 (Deposition Exhibit No. 168 was marked for
 9 identification.)
 10 Q. (BY MR. EGLICK) Showing you what's been
 11 marked as Exhibit 168 to your deposition, can you
 12 identify it?
 13 A. (Witness reviewing document.)
 14 Are you asking me to characterize it or --
 15 Q. Well, have you ever seen it before?
 16 A. Yes.
 17 Q. What is it?
 18 A. It is a letter -- it's a document that is in
 19 a letter form dated September 28th, 2000 from me to Mic
 20 Dinsmore, executive director of the Port, with a cc to
 21 Governor Locke. And it is in regards to the Port of
 22 Seattle's withdrawal of its 401 Water Quality
 23 Certification.
 24 Q. And was this one of the letters whose
 25 contents was negotiated with the Port at those two

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1 meetings at the Port's offices in September 2000 that
 2 you attended and Mic Dinsmore attended?
 3 A. This letter isn't signed, so I'm wondering if
 4 this -- actually we ever sent this letter. I'm not
 5 absolutely certain that we did.
 6 Q. That wasn't my question, though.
 7 A. Well, I'm asking you a question, because --
 8 Q. This is a document we got from Ecology. But
 9 my question is, I think, without having the reporter
 10 read it back, which I can do, was whether --
 11 A. I'm sorry. I'll stick with your questioning,
 12 I apologize.
 13 Q. Was this one of the documents that was --
 14 whose contents was negotiated with the Port at those
 15 meetings at the Port's offices in September 2000 that
 16 you and Mic Dinsmore attended?
 17 A. No.
 18 Q. Was it negotiated, the contents negotiated
 19 after those meetings?
 20 A. No.
 21 Q. Well, how did this letter come about, this
 22 document?
 23 A. The contents of this letter, as I recall --
 24 this letter was not negotiated. This letter reflects
 25 commitments, agreements and understanding coming out of

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1 a series of meetings with the Port.
 2 Q. And that included the two meetings at the
 3 Port of Seattle's offices in September 2000 that you
 4 and Mic Dinsmore attended?
 5 A. Yes.
 6 Q. Now, was there a time when Ecology decided
 7 that it should not share with the public anymore the
 8 benefit of staff review and comments on Port proposals
 9 and documents?
 10 A. No.
 11 (Deposition Exhibit No. 169 was marked for
 12 identification.)
 13 Q. (BY MR. EGLICK) Showing you what's been
 14 marked as Exhibit 169, can you identify it?
 15 A. It's an e-mail from Ray to myself, Tom Luster
 16 and other staff members -- if you're interested, I'll
 17 read all of their names into the record -- as well as
 18 Joan Marchioro.
 19 Q. Now, this e-mail suggests that certain
 20 documents be withheld from disclosure from that point
 21 forward, doesn't it, "that point" being October 3rd,
 22 2000?
 23 A. No. This document doesn't, and I'd like to,
 24 if I might -- I don't know if this is appropriate, but
 25 go back to your previous discussion -- question, I'm

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1 sorry.
 2 Q. Well, I'll ask you another one since -- in
 3 the interest of time.
 4 Do you see where this document says, "I'm
 5 assuming that as we're in the midst of working toward a
 6 final 401 decision, all relevant internal documents
 7 should be considered deliberative and do not need to be
 8 disclosed at this time."?
 9 Do you see that?
 10 A. I do see that. So your previous question as
 11 I recall it was, was there a time when Ecology decided
 12 that public records would not be disclosed, and my
 13 answer was no. There was never a time, and public
 14 records are never withheld. This memo suggests, as my
 15 recollection exactly in answering your previous
 16 question, is that there are some internal documents,
 17 working deliberative documents that are -- do not --
 18 are not by the law required to be disclosed at a
 19 certain time frame of deliberation. And it's a fine
 20 point, but I think it's a very important point.
 21 Q. Was my previous question about public
 22 records? Do you want me to have it read back?
 23 A. Please.
 24 MR. EGLICK: I think it started, "Was there a
 25 time when."

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1 (Reporter read back as requested.)
 2 MR. EGLICK: And what was the witness's
 3 answer?
 4 THE WITNESS: No, I believe.
 5 Q. (BY MR. EGLICK) Okay, let's move on.
 6 Now, you would agree, Mr. Fitzsimmons, that
 7 my previous question actually didn't say "public
 8 records," it referred to the benefit of staff analysis
 9 of Port proposals; is that right, now that you've had
 10 it read back?
 11 A. It also said "documents."
 12 Q. Okay.
 13 (Deposition Exhibit No. 170 was marked for
 14 identification.)
 15 Q. (BY MR. EGLICK) Now showing you what's been
 16 marked as Exhibit 170 to your deposition, can you
 17 identify it?
 18 A. Yes. This is an e-mail from Joan Marchioro
 19 to me dated October 23rd, 2000. Attached to it was a
 20 final draft of the third runway 401 -- actually two
 21 documents titled that, Word documents, and I need a
 22 minute to see if they're here. I think I've described
 23 it. It is a -- now that I track through it all better,
 24 it's a series of e-mails, a string of e-mails starting
 25 back Monday, October 23rd at 11 a.m. from Rachel McCrea

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1 to Ray Hellwig and a group of other people, attaching a
 2 draft, notes, and then that original e-mail appears to
 3 be passed on from Tom Luster to others.
 4 And then that Tom Luster e-mail is passed on
 5 by e-mail from Joan to me.
 6 Q. Okay. And the Tom Luster memo was one that
 7 you ultimately ordered the Department to release,
 8 didn't you, after the public protested that it was
 9 being withheld?
 10 A. Let me refresh -- may I think just a moment
 11 to just sort of refresh my memory around this?
 12 Q. Sure. Do you recall you were actually called
 13 by some legislators who wanted to know why the
 14 memorandum was being withheld?
 15 A. I do recall that.
 16 I do not specifically recall if this is one
 17 of the memos that they were talking about. It would
 18 take me a few more minutes to get this recollection
 19 back in my mind.
 20 Q. Well, I pulled the next document. If you
 21 want to keep on looking, that's fine.
 22 MR. MANNING: I'm going to take this
 23 opportunity to leave the room for just a second. Back
 24 in a moment. Go ahead.
 25 A. (Witness reviewing document.)

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1 Yes, I think this is -- now that I look at
 2 it, I think this is the document, if there weren't more
 3 than one, but I think this is one of the documents that
 4 were -- that the legislators called me about suggesting
 5 that there was a document that we are withholding that
 6 would, under this deliberative review choice, so we
 7 were withholding it from immediate review -- I mean,
 8 immediate disclosure. And they, as I recall, wanted --
 9 claimed that it had something in it that proved that
 10 Tom was removed from the project or that the project is
 11 already inappropriately decided upon or something like
 12 that, as I recall.
 13 And in response to that request, I just
 14 simply said, Fine, if you don't trust us, as I recall
 15 I, on the phone, I said, We'll just release the
 16 document. And then had it released.
 17 Q. (BY MR. EGLICK) Okay. And who had ordered
 18 it withheld?
 19 A. I think it was one of a number of documents
 20 that were held back in timing from public release under
 21 this need for an opportunity for our staff to be
 22 deliberative in -- and not have to have their written
 23 documents reviewed by the public before we had an
 24 opportunity to deliberate them -- on them.
 25 Q. The document concerns, doesn't it, among

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1 other things, discussions with the Port concerning its
 2 401 application?
 3 A. Yes, it does.
 4 (Deposition Exhibit No. 171 was marked for
 5 identification.)
 6 Q. (BY MR. EGLICK) Showing you what's been
 7 marked as Exhibit 171 to your deposition, can you
 8 identify it?
 9 A. It is a legal document. I'm not an attorney,
 10 so I'm not sure what the name of this is, but --
 11 Q. Why don't you read the title?
 12 A. Pollution Control Hearing Board for the State
 13 of Washington --
 14 Q. Now, look at the bottom, the right there --
 15 there you go.
 16 A. There we go, ACC's Interrogatories. So it is
 17 I guess ACC's interrogatories to the Department of
 18 Ecology in this ACC versus the State on the Port of
 19 Seattle permit.
 20 Q. And it's DOE's response as well, isn't it?
 21 A. Yes, it is.
 22 Q. Take a look at Page 9, if you would, second
 23 line from the bottom. Do you see your name there?
 24 A. I do.
 25 Q. And you're listed as someone, quote, who

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1 supplied information in answer to these
 2 interrogatories, quote.
 3 Do you see that?
 4 A. I do see that.
 5 Q. Is that correct?
 6 A. Yes, I believe I -- well, I was -- I recall
 7 being a party to the preparation of these -- of this
 8 interrogatory.
 9 Q. And how were you a party to the preparation
 10 of the responses?
 11 A. My attorneys and staff interacted with me,
 12 either in supplying records or -- let me see, if you
 13 might, if there's actually a direct statement from me
 14 in the interrogatories here.
 15 Q. Well, let me help you out. Look at
 16 Interrogatory 17, Page 34, please. And could you read
 17 that interrogatory into the record, please.
 18 A. Uh-huh. I'm sorry, Page 34?
 19 Q. Interrogatory 17, Page 34. Do you have it
 20 there?
 21 A. I'm hoping.
 22 "Describe in detail the contents of any
 23 meeting or communication in which Joan Marchioro, Tom
 24 Fitzsimmons and/or Port Counsel Jay Manning (or others)
 25 participated addressing in whole or in part the need or

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1 potential use of a water right for implementation of
 2 flow mitigation for the Third Runway Project, which
 3 took place on April 2nd, 2001."
 4 Q. Now, were you asked to provide information in
 5 response to that interrogatory?
 6 A. Yes, I was.
 7 Q. Okay. And what information did you provide?
 8 A. If I recall, I was asked about my
 9 recollection of the conversation, and I provided that
 10 recollection.
 11 Q. And what did you provide as a recollection?
 12 A. The interrogatory says my answer -- on 17, is
 13 that what we're --
 14 Q. Right, but I'm asking what information you
 15 provided, not what this piece of paper says.
 16 A. Oh, I'm sorry.
 17 Well, I provided my recollection of the
 18 conversation which was a three-party conversation,
 19 Joan, myself and Jay Manning, and an opportunity for
 20 Mr. Manning, representing the project applicant, to
 21 share the project applicant's view of whether or not
 22 the water -- whether or not the stormwater facility as
 23 part of the project needed a water right.
 24 Q. Okay. And what was the means by which -- was
 25 this a telephone call?

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1 A. Yes, it was.
 2 Q. Okay. And did Jay Manning just happen to
 3 call you up and catch you on the phone with Joan in
 4 your office, Joan Marchioro?
 5 A. No, I was at an airport in Eastern
 6 Washington, Joan was someplace else and Jay was
 7 someplace else, and my secretary arranged -- it's not
 8 too extraordinary -- an opportunity while I was waiting
 9 for a plane to make a phone call. Or I can't remember
 10 whether he called me or I called him.
 11 Q. So for some reason on April 2nd you decided
 12 you wanted to talk with Jay Manning about whether the
 13 Port needed a water right?
 14 A. As I said, I can't remember whether I called
 15 him or he called me. I do recall that my secretary
 16 said that the Port wanted to talk to me, and I can't
 17 recall whether I dialed the phone or he dialed the
 18 phone to me. That's what I meant by whether I called
 19 him or he called me.
 20 Q. So had the meeting -- excuse me, had the
 21 telephone call been arranged a day in advance or a week
 22 or anytime in advance?
 23 A. I think that morning, if I'm not mistaken.
 24 Q. In other words, that morning someone called
 25 your secretary from Jay Manning's office and said, Jay

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1 Manning wants to talk to the director; is that correct?
 2 A. I imagine it is, yes. I'm not absolutely
 3 certain of the facts.
 4 Q. And so you were at, you said, someplace in
 5 Eastern Washington?
 6 A. Yes.
 7 Q. Then made the arrangements to get on the
 8 phone with Jay Manning and Joan Marchioro; is that
 9 right?
 10 A. Yes, that's right.
 11 Q. And when you got on the phone did you know
 12 what the topic was?
 13 A. I recall, yes, that Diane told me -- let me
 14 just see if I'm -- may I, I'm sorry to interrupt. My
 15 pager is going off like crazy here --
 16 (Interruption.)
 17 A. Back to the question. My recall is that my
 18 secretary told me that the topic of the conversation
 19 was the Port's water right.
 20 Q. (BY MR. EGLICK) And which members of the
 21 401 -- or do you call it a "team" now, the folks who
 22 were reviewing the Port's 401, is that what you call
 23 it, a "team"?
 24 A. Yeah, I've used that term. It's in my head
 25 in terms of a team of people.

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1 Q. Which members of the 401 team were on the
 2 call?
 3 A. Well, if you want to consider Joan on the
 4 team, I could suggest that, but Joan and Jay and I were
 5 on the call. That's the fact.
 6 Q. Is Joan on the team or is Joan the attorney
 7 general who advises the team?
 8 A. Is the answer to that really that important?
 9 I mean, is it really that important, because we could
 10 get into this, okay? My consideration of what the team
 11 is versus your point. I mean, is it really that
 12 important? If it is, I'll answer it as I understand
 13 it.
 14 Q. Why don't you answer it, Mr. Fitzsimmons.
 15 A. I consider Joan Marchioro part of the team,
 16 yes.
 17 Q. So she's not just the attorney general
 18 advising Ecology, she's part of the 401 decisionmaking
 19 team; is that correct?
 20 A. Yes. In my view, yes.
 21 Q. Okay, thank you.
 22 Now, how long did the phone call last?
 23 A. Rough recollection, ten minutes maybe, at the
 24 most.
 25 Q. Okay. And what did Mr. Manning say?

1 A. As I recall, he laid out the Port's and his
2 views about the issue at hand, and the issue was
3 whether the -- a water right permit was required for
4 the stormwater aspects of the Water Quality
5 Certification.

6 Q. And are you particularly expert in water
7 rights law?

8 A. I know a lot about it. I don't claim to be
9 an expert.

10 Q. Okay. Are there people on the 401 team who
11 know a lot about it?

12 A. Yes.

13 Q. Okay. Why not have them on the call?

14 A. One of them was.

15 Q. Oh, okay. Joan Marchioro again?

16 A. Yes.

17 Q. Why not have somebody from your department on
18 the call, other than you? I understand you are from
19 your department, but you're the director.

20 A. Well, because a project proponent wanted
21 access to the director to share their views over a
22 critical matter, and that's a very frequent occurrence.

23 Q. So in those circumstances you don't include
24 staff --

25 A. Sometimes I do --

1 team meeting that was scheduled for two days later to
2 discuss this very issue?

3 A. Yes, there was. So one of the issues is the
4 timing of it, as I suggested previously.

5 Q. And didn't Mr. Manning want you to weigh in
6 on the issue before the senior management team meeting?

7 A. I don't understand your question. Didn't --
8 didn't --

9 Q. Let me ask a different question.

10 A. Are you asking me a question or putting a
11 statement in my mouth?

12 Q. Well, did Mr. Manning ask you to weigh in on
13 the issue with your staff before the senior management
14 team meeting?

15 A. To the best of my recollection, the
16 conversation was Mr. Manning expressed his views about
17 what decision the Department of Ecology should make
18 relative to the water right.

19 Q. And what did you do with regard to that topic
20 after you spoke with Mr. Manning at any time?

21 MR. EGLICK: I'm sorry, no notes passed to
22 the witness.

23 MS. MARCHIORO: I'm not passing it to the
24 witness.

25 MR. MANNING: This note was just slipped

1 Q. I'm sorry, you have to let me finish the
2 question.

3 A. I'm sorry.

4 Q. You don't include staff who's actually
5 working on the application?

6 A. In those circumstances, sometimes staff are
7 included, sometimes they're not. It depends on the
8 issue, it depends on my accessibility. It depends on
9 my knowledge of the issue at hand.

10 Q. Now, what did Mr. Manning want out of you in
11 this call; in other words, maybe to explain my
12 question, he's calling you, you're in an airport in
13 Eastern Washington. What did he expect you to do as a
14 result of that call?

15 A. I think Mr. Manning's only expectations were
16 for me to listen and to take his views into
17 consideration.

18 Q. And why was it necessary to conduct a call
19 from an airport in Eastern Washington as opposed to
20 say, Well, you know, at some point we'll get together,
21 we'll have a meeting and we'll talk about it?

22 A. It could be I was unavailable for meetings
23 for days or for the week before. It could be the issue
24 just came up.

25 Q. In fact, wasn't there a senior management

1 under the door by a secretary.

2 A. That probably relates to my beeper going off.
3 Help me -- ask again, please.

4 Q. (BY MR. EGLICK) What did you do with
5 relation in any way to the topic of the phone call you
6 had with Mr. Manning after the phone call?

7 A. I pondered his view, I took that view into
8 the conversation and decisionmaking that occurred at
9 the senior management team meeting several days later,
10 and I weighed and balanced his suggestions against
11 other, both legal and political and what to do,
12 opinions on this matter. That's it.

13 Q. So you were actually an attendee at the
14 senior management team meeting?

15 A. Yes, I was.

16 Q. And you participated in the deliberations
17 there?

18 A. Yes, I did.

19 Q. And that's where the decision was made then,
20 two days later after your call with Mr. Manning, to not
21 require a water right for the Port; is that correct?

22 A. Actually, that's not exactly correct. It is
23 the place where the decision on whether or not a
24 stormwater facility requires a water right, and then
25 second to that is the application of that water right

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1 decision to the Port project.
 2 I guess the difference I'm trying to say is
 3 that it was a decision on both the policy and a legal
 4 question about whether or not stormwater facilities
 5 relative to 401 Certifications needed a water right.
 6 Q. Okay. Could you look at the interrogatories
 7 exhibit which is Exhibit 171, Page 35, Interrogatory
 8 No. 18, second sentence of the answer.
 9 A. Here it is.
 10 Q. Page 35, Interrogatory 18, second sentence of
 11 the answer. Could you read that second sentence into
 12 the record, please.
 13 A. "Ecology's senior management team decided on
 14 April 4, 2001 that a water right was not required for
 15 the low flow mitigation portion of the Third Runway
 16 Project."
 17 Q. Okay. Is that an accurate statement?
 18 A. Yes.
 19 Q. Now, at some point -- and by the way, you're
 20 aware that the Pollution Control Hearing Board in its
 21 stay decision has addressed that topic, aren't you?
 22 A. Yes.
 23 Q. And what action is Ecology taking in
 24 response -- if any, in response to the Pollution
 25 Control Hearing Board's stay decision?

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1 A. We are appealing that decision.
 2 Q. Any other action being considered or taken?
 3 A. It's such a broad -- we've had discussions
 4 about whether that should be the legal framework for
 5 other projects.
 6 Q. Any other actions or decisions being
 7 considered with regard to the Third Runway Project?
 8 A. I have considered through conversations with
 9 others about the possibility of having the legislature
 10 clarify whether this should or should not be the policy
 11 of the state. I think we talked previously about
 12 actions related to instructions to the Port, et cetera.
 13 That's my answer.
 14 Q. Has the Ecology department advised the Port
 15 to go get a water right?
 16 A. No.
 17 Q. To your knowledge, is the Port taking any
 18 steps to obtain a water right?
 19 A. No, because I don't believe they need one.
 20 Q. Okay. And do you know whether anyone on the
 21 401 team has ever suggested that the Port does need
 22 one?
 23 A. No, I'm not aware that someone has ever
 24 suggested that they do need a water right.
 25 Q. Has anyone on the 401 team ever suggested

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1 that it's a possibility that the Port needs a water
 2 right?
 3 A. Yes. Yes.
 4 Q. Who has suggested that?
 5 A. By my descriptions our legal counsel as part
 6 of the team and as part of the deliberations, we talked
 7 about the law and how to interpret the law. And one
 8 interpretation of the law is that they might need one.
 9 Another interpretation of the law is that they might
 10 not. The law is very unclear on it.
 11 Q. Please focus on my question,
 12 Mr. Fitzsimmons --
 13 A. I'm answering --
 14 Q. For your sake, I had asked for --
 15 A. The last sentence is where I varied. Beyond
 16 that I think I'm within clearly the scope of your
 17 question.
 18 Q. I asked you who had suggested that they might
 19 need a water right. And I'm really happy to hear the
 20 rest of your answer, it's just I know you're on a tight
 21 time frame, so I'm trying to accommodate you.
 22 MS. MARCHIORO: And when we conclude this,
 23 can we take a break, please, so I can give him this
 24 phone message?
 25 MR. EGLICK: Sure.

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1 A. Well, I don't know that I need to answer the
 2 question. And the reason for it is because I don't
 3 know whether I am violating attorney-client privilege
 4 by answering your question or not.
 5 Q. (BY MR. EGLICK) Well, I think you've already
 6 given me that answer, but what I'm asking is anyone
 7 else other than legal counsel because you've already
 8 answered that.
 9 A. Well, that's -- to the best of my knowledge,
 10 that's the extent of -- no, I take it back. There
 11 are -- well, I don't know.
 12 Q. What about Bob Barwin, do you know him?
 13 A. I was going to just say, there are people in
 14 the program in the course of the discussion about
 15 whether a water right is needed or not, who -- that
 16 argued on behalf of a water right needing to be
 17 required and there are others who argued that it's not
 18 required.
 19 Q. So Bob Barwin is one who argued that it was?
 20 A. I vaguely recollect that, yes.
 21 Q. Who else? I'm asking this because we may
 22 want to do discovery with these folks, but I'm entitled
 23 to know who they are first.
 24 A. Well, I think Bob -- I don't know who else,
 25 and the reason being is because at the program level,

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1 his -- I wasn't involved in the program water
 2 manager/staff discussion on this. So there may be
 3 others, but I don't know.
 4 It was characterized to me that there are
 5 some staff who, on balance, believe that it's best to
 6 require a right. There were other staff who, on
 7 balance, believed it was not required. And
 8 specifically who, I don't know. I do recall Bob
 9 Barwin's name on the side of they're not requiring a
 10 water right.
 11 Q. They're not or they do require it?
 12 A. That in his judgment we should require a
 13 water right.
 14 MR. EGLICK: Okay. Thanks.
 15 (Recess taken.)
 16 MR. EGLICK: Back on the record.
 17 Q. (BY MR. EGLICK) Mr. Fitzsimmons, who was the
 18 lead -- well, strike that.
 19 Did you have someone who was team leader for
 20 the 401 team?
 21 A. Ray Hellwig, I would characterize as the team
 22 leader.
 23 Q. So what -- and once again, because you seem
 24 to be very sensitive about words, if there's a better
 25 term for it, pick it, but what I'm trying to find out,

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1 what Ray Hellwig's role was if he was team leader.
 2 A. To oversee that the project elements were
 3 on -- that were, you know, activities that were
 4 occurring were done in a timely manner to ensure that
 5 there was an opportunity and coordination between all
 6 of the parties internal to the agency to voice
 7 concerns, play their role to sort of manage some staff
 8 resources which is not a unique role to him -- not to
 9 digress, but all of the regional managers in big
 10 projects are -- have the role of helping to manage the
 11 resource allocation in the form of staff, in the form
 12 of meeting time and those sorts of issues.
 13 I believe he managed the contract or at least
 14 oversaw a contract related to outside consultants. He
 15 interacted with the Port of Seattle at his level in
 16 terms of team management and issue dealings and
 17 schedulings. So those are the things I would say
 18 characterize his role.
 19 Q. Was he also lead in interacting with you as
 20 the director?
 21 A. Yes.
 22 Q. Was he also lead in assisting you in
 23 interacting with the Port of Seattle?
 24 A. Yes.
 25 Q. And what about lead in assisting you in

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1 interacting with the governor's office?
 2 A. Actually I think I was interacting with the
 3 governor's office without him being a lead assistant.
 4 I was doing that directly myself.
 5 Q. Okay. Now, was he supposed to have a
 6 substantive role also in terms of deciding which way in
 7 particular an environmental issue would be resolved?
 8 A. He did have a substantive role in the form of
 9 him -- his opinion being an opinion. The ultimate
 10 decision on 401 permits as well as others is -- was
 11 actually in the hands of Gordon White.
 12 Q. Now, was the 401 -- to your knowledge, was
 13 the 401 decision drafted under Gordon White's
 14 supervision?
 15 A. Gordon White had a role in the drafting, to
 16 the best of my knowledge, and Gordon White is the
 17 direct supervisor of several of the staff that are
 18 involved in the -- on the team.
 19 Q. My question, though, was, and I'm not trying
 20 to interrupt you, but I just -- it will save time.
 21 A. I'm thinking out loud which obviously is not
 22 something of value to you or what you want out of me.
 23 Q. No, it's neither of that. It's just that
 24 it's your -- I've been told several times your time is
 25 short and I think my question was more concise perhaps

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1 than the answer you're giving.
 2 And the question was, was the 401 decision
 3 drafted under Gordon White's supervision?
 4 A. Yes.
 5 Q. Well, you're gesturing. Do you want to
 6 reconsider your answer or -- let me ask you another
 7 question.
 8 A. Yes, it was --
 9 Q. Go ahead.
 10 A. -- but not in total.
 11 Q. Okay. Well, who else supervised drafting of
 12 the 401 decision?
 13 A. Ray Hellwig.
 14 Q. Who had the more direct role in supervising
 15 drafting of the 401 decision?
 16 A. Ray Hellwig.
 17 Q. And who did the actual drafting, if you know?
 18 A. I don't know. In fact, actually I do know,
 19 Ann Kenny.
 20 Q. And she works in the Northwest Regional
 21 Office?
 22 A. Yes, she does.
 23 Q. Okay. Now, did you review the 401 decision
 24 that was issued in August 2001 before it was issued?
 25 A. Yes.

<p style="text-align: right;">Page 102</p> <p>1 Q. And how did it look to you? 2 A. It looked like a 401 decision. 3 Q. Did it look pretty solid? 4 MS. MARCHIORO: Objection, vague. 5 Q. (BY MR. EGLICK) Did it look like a competent 6 401 decision to you, Mr. Fitzsimmons? 7 A. Are you referring to the decision as 8 finalized or are you just referring to a draft 9 decision? 10 Q. Well, I guess what I was assuming, and I 11 appreciate your pointing this out, that you actually 12 saw the final decision when it was in final draft form 13 and before it was issued. 14 A. That's an incorrect assumption. 15 Q. Okay. Then let me ask -- 16 A. I reviewed the 401 decision in draft and in 17 final. 18 Q. Okay. 19 A. When I reviewed it in final -- to get to your 20 question -- 21 Q. Go ahead. 22 A. -- I unequivocally think it's a competent 401 23 decision. 24 Q. And you're talking about the August 2001 25 decision?</p>	<p style="text-align: right;">Page 104</p> <p>1 A. Yes. 2 Q. So if the 401 decision that was issued in 3 August was, you thought -- you used the word 4 "perfectly" in there somewhere, didn't you? 5 A. Uh-huh. 6 Q. When did it become imperfect in some way? 7 A. When information about the project became 8 known that was not known to our staff in reviewing the 9 project. 10 Q. Now, let me ask you this, if you can recall. 11 How many years has the Department of Ecology been 12 reviewing the Port's project? 13 A. Probably this review has taken place over 14 about a five-year period of time, I think. 15 Q. And would you agree there are literally tens 16 of thousands of pages of documents relating to that 17 review? 18 A. I would accept that, yes. 19 Q. And thousands of hours of staff time? 20 A. Definitely. 21 Q. And your testimony is that in August you 22 issued a decision that you thought was a perfectly 23 acceptable 401 decision -- 24 A. Yes. 25 Q. -- and then at some point between August 10th</p>
<p style="text-align: right;">Page 103</p> <p>1 A. Yes. 2 Q. And you felt that way when you reviewed it in 3 a draft? 4 A. In a draft, there were changes made, I added 5 value in my review of that draft, and it was improved 6 as a decision in clarity, in other aspects. And then 7 the final was perfectly -- I'm perfectly satisfied with 8 -- I was perfectly satisfied with the final. 9 Q. Okay. And you expected the Port to be as 10 well, didn't you? 11 A. No, I did not. 12 Q. You did not? 13 A. No. 14 Q. So you anticipated when the August 401 15 decision was issued that the Port would not be 16 satisfied with it? 17 A. Yes, I did. 18 Q. And nonetheless, in your judgment as director 19 of the Department, it was the appropriate decision to 20 issue; is that correct? 21 A. Yes. 22 Q. When did you change your mind about that? 23 A. So you presume I changed my mind about that? 24 Q. Well, are you aware that the Department 25 withdrew that August 401 decision and issued a new one?</p>	<p style="text-align: right;">Page 105</p> <p>1 and -- wasn't the second decision September 21, I 2 think? 3 A. September 21 of 2000. 4 Q. 2001? 5 A. Yeah, of 2001. Okay. 6 Q. Your staff became aware of new information 7 about the project that had not been known before that 8 justified revoking the August decision and issuing a 9 new one; is that your testimony? And I'll have it read 10 back if you like. 11 A. Perhaps I'm confused here. So I'm not sure 12 what my testimony is. 13 Q. All right. Well, let's go through it again 14 because maybe you're not aware of this chronology. 15 Let me show you what's been marked in all the 16 depositions we've been taking as Exhibit 2, and can you 17 identify that? 18 A. (Witness reviewing document.) 19 I now know where my own confusion lies. 20 Q. Okay. 21 A. You were using -- you in several of your 22 questions, or at least I heard you to say, in August of 23 2000. 24 Q. Oh, I apologize for that if I did. 25 A. If I might explain, where I was confused was,</p>

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1 I think about August of 2000, some time frame in there,
 2 we issued a 401, the Port -- maybe it was 1999, maybe
 3 I'm confused, but my recollection is we issued a 401,
 4 the Port withdrew from the 401, and that 401 had to do
 5 with an assumption about the acreage of wetland. And
 6 we found out later that there was additional wetlands
 7 that had not been considered and so we started the 401
 8 process over again with a resubmittal.
 9 So I was thinking you were referring to that
 10 series of 401 submissions and withdrawals.
 11 Q. And I understand what you're talking about,
 12 and I apologize if I used the wrong year. Let's start
 13 over.
 14 You've got in your hand now what's Exhibit 2
 15 to all of the depositions we've been taking here which
 16 is, I'll represent to you, and I'd like you to confirm
 17 if I'm right, the August 10, 2001 401 decision.
 18 A. Right. I did review this, this 401 as well
 19 in draft, as it was brought to fruition in terms of
 20 close to being final. And then I reviewed it in
 21 final. And on the August 2001 401, I believed at the
 22 time and still do believe that it is a very
 23 appropriate, I used the term "perfectly acceptable" and
 24 I'll stick with that term, 401 decision.
 25 Q. Okay. And then you know what the questions

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1 are going to be now.
 2 A. I do.
 3 Q. Then what happened?
 4 A. What occurred, which is, in my experience,
 5 something that occurs on other projects as well, is --
 6 one question you asked, I'll just ask it and answer it,
 7 is, did I anticipate the Port to be perfectly happy and
 8 my answer was no, something to that effect.
 9 Q. Right. And I said --
 10 A. There are conditions in here that I thought
 11 the Port would have concerns about.
 12 Q. And you were prepared to state that that was
 13 a perfectly acceptable 401 decision?
 14 A. That's correct.
 15 Q. Despite concerns the Port would raise?
 16 A. Correct.
 17 Q. And was there any provision in there, in that
 18 August 2001, 401 decision that you looked at and said,
 19 Well, you know, it's, to use that old -- and I don't
 20 particularly agree with it, perjorative -- it's good
 21 enough for government work, I'm just sending it out the
 22 door?
 23 A. Absolutely not.
 24 Q. So you were proud of that?
 25 A. Absolutely proud of this decision.

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1 Q. All right. So you put it out the door and
 2 you knew the Port -- there might be things the Port
 3 would quibble about, but you were going to stand by it;
 4 is that right?
 5 A. And I still to this day stand by it.
 6 Q. But your Department did, a little over a
 7 month later, withdraw it and issue a modified decision?
 8 A. They certainly did.
 9 Q. Now, between --
 10 A. We certainly did.
 11 Q. Right. And between August and September when
 12 you did that, how many times were you contacted by the
 13 governor's chief of staff?
 14 MS. MARCHIORO: Objection, vague.
 15 Q. (BY MR. EGLICK) Well, what's vague about it,
 16 Mr. Fitzsimmons, to you? Do you know who the
 17 governor's chief of staff is?
 18 A. I do.
 19 Q. Do you know what the word "contact" means?
 20 A. I do.
 21 Q. Do you know what "how many times" means?
 22 A. I do.
 23 Q. Is there something that I can clarify for
 24 you?
 25 A. No.

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1 Q. Okay.
 2 A. I would say I -- he contacted me --
 3 Q. "Contact" means any form of communication.
 4 So we don't quibble about that. E-mail, pony express,
 5 carrier pigeon, in person, meeting, whatever.
 6 A. Fine. Then I'd say it was probably five
 7 or -- between five and seven times.
 8 Q. And that's between August 10th when the 401
 9 was originally issued, and September 21 when you issued
 10 the revised 401?
 11 A. Yes.
 12 Q. And the governor's chief of staff is Paul
 13 Isaki?
 14 A. Yes.
 15 Q. And he was contacting you, among other
 16 things, wasn't he, to let you know that the Port was
 17 not happy with the August decision; is that correct?
 18 A. Actually, no, because I already knew that,
 19 because the Port contacted me directly.
 20 Q. Okay. But he was contacting you to tell you
 21 that as well, wasn't he?
 22 A. He was contacting me to say, How do we deal
 23 with this, Tom? The Port's dissatisfied, they're
 24 raising concerns about clarity, they're raising
 25 concerns about conditions. Are we willing to -- what

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1 is the appropriate thing to do here? What have we done
 2 in the past? And then over a series of subsequent
 3 contacts and meetings, as you well know by the record,
 4 we engaged in a series of meetings.
 5 Q. I don't well know that, by the way. There's
 6 very little record of it, oddly enough.
 7 A. Okay. Well, we, in sticking with this
 8 contact theme here, at times Paul Isaki was involved,
 9 at other times he was not. As we understood, worked
 10 through the Port's concerns about the 401 decision and
 11 we clarified elements of those concerns.
 12 Q. Now, you said the Port had already told you
 13 or you already knew the Port was unhappy with it. So
 14 the Port had told you that after August 10 when the
 15 first 401 was issued?
 16 A. Yeah. Actually I think the, if I'm not -- I
 17 think I have this correct, we issued the August 10th
 18 401 decision publicly and the Port got it at exactly
 19 the same time. That afternoon or the next day Ray told
 20 me they had got it, reviewed it, expressed some
 21 concerns about it.
 22 Q. Now, the Port had already gone to the
 23 director of the Department, which is over the head of
 24 the team, isn't it, the 401 team?
 25 A. If you want to quibble, I consider the

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1 Department director to be part of the team, too.
 2 Q. Okay.
 3 A. We can play those word games.
 4 Q. But you're the director?
 5 A. Sure.
 6 Q. The Port had already let you know they were
 7 unhappy; is that right?
 8 A. Yes.
 9 Q. They already let Ray Hellwig know they were
 10 unhappy; is that right?
 11 A. Yes.
 12 Q. Was Paul Isaki called by you to say, I've
 13 heard from the Port they're unhappy?
 14 A. Actually I think Paul Isaki heard from the
 15 governor who had -- somebody associated with the Port
 16 mentioned to the governor that, and this is maybe
 17 several days after this, that they have got it and
 18 there are conditions in it that they're concerned
 19 about. So it kind of went through that process.
 20 Q. From the Port to the governor to Paul Isaki
 21 and then to you?
 22 A. Yes.
 23 Q. And then from there the chronology flowed, as
 24 you've described it, resulting in the issuance of a
 25 September modification; is that right?

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1 A. Correct.
 2 Q. Now, did you carefully examine for yourself
 3 the changes that were made between the August 401 and
 4 the September modification, and what we're talking
 5 about --
 6 A. Yes.
 7 Q. -- for the deposition, Exhibit 1 is the
 8 September 21, and the August one I think is Exhibit 2.
 9 A. Right.
 10 Q. I'm not going to give the reporter new copies
 11 of it, but we're all agreed on that.
 12 A. Yes, I did. I was involved in understanding
 13 a list of issues that the Port was raising. I was
 14 involved in giving guidance and interpreting our
 15 choices back to the governor's office. I was involved
 16 in a meeting with the Port at the Mic Dinsmore, Gina
 17 Marie Lindsey, Mike Leavitt level, at which I and Paul
 18 Isaki and Ray Hellwig met with them.
 19 Q. Who's Mike Leavitt? I know Elizabeth
 20 Leavitt.
 21 A. Michael Cheyne. It's Michael -- Michael
 22 Cheyne. I'm sorry.
 23 Q. And he's the person from the Port you
 24 mentioned earlier?
 25 A. Yes. That meeting listed out their concerns.

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1 We had our staff at the staff level first understand
 2 what the differences -- what their concerns are and --
 3 around words, around possible interpretation of words
 4 and all of those issues. I believe they -- at legal
 5 and staff levels, there were discussions, resolutions
 6 to those issues.
 7 Then came the question of, is the 401
 8 substantially changed. I believed it was not in terms
 9 of its environmental outcome and in terms of the
 10 requirements placed on the Port through it. Was it
 11 improved? Yes, because it was clarified, people
 12 understood it better. And it is that month or so of
 13 activity that led to the withdrawal of the 401 by the
 14 Department and the resubmission of the 401 by the
 15 Department.
 16 Q. Okay. Let me ask you a few questions about
 17 that, and I'm going to try to ask you focused questions
 18 because this is really my last line of questioning.
 19 A. Great.
 20 Q. So the light's at the end of the tunnel,
 21 maybe.
 22 First of all, did you give any consideration
 23 in providing an opportunity for public notice and
 24 comment on the change in the 401 Certification?
 25 A. I recall that question being asked, and we

1 determined that legally it was not required and that
2 the public had ample opportunity through the PCHB
3 processes, et cetera. I believe that the -- then it
4 was answered and I can't remember whether it was by the
5 PCHB or our own conclusions, that it --

6 Q. Are you answering my question now or are you
7 going on to bigger things?

8 A. Okay. I'll go back. I'm sorry.

9 Q. Well, let me ask you another question.

10 A. I'm apparently trying to be more helpful than
11 you're wanting me to be.

12 Q. It's not the helpfulness that I --

13 A. The answer is yes, we did consider whether or
14 not public needed an opportunity to be -- give comment
15 on the changed 401.

16 Q. And by the way, I'm happy to have your help,
17 but then I'm concerned that you're going to complain
18 about the time. So it's kind of a, you know, a
19 conundrum. Let's move ahead.

20 Ultimately no public notice and opportunity
21 for comment was given before the September 21 amended
22 401 was issued, was it?

23 A. I recall that to be the case.

24 Q. And in fact, you were saying a minute ago,
25 well, it was determined that legally there was no

1 401; is that correct?

2 A. Perhaps -- I'd like to withdraw that
3 statement, okay? Because I'm not sure that's what I
4 meant. So I withdraw that statement.

5 Q. Okay. Now, you said something about the
6 amended 401 September one is clearer than the August
7 one. Am I right on that?

8 A. You are -- that's one characterization I
9 placed on it, yes.

10 Q. And is the amended 401 clearer in terms of
11 the scope of projects that are covered by its -- by the
12 scope of the projects that are covered by its
13 conditions?

14 A. That was, as I recall, one of the issues on
15 this list of six or eight issues. And so thus I recall
16 that the question of what was the Department's intent
17 in a series of items in the August 10th 401 relative to
18 the scope, and that was clarified in the September 21st
19 version, yes.

20 Q. Well, wasn't it in fact clarified in this
21 way, that is, that the original 401 said all of the
22 Port's master plan update projects are covered, whereas
23 the amended 401 said, some are covered, some are not,
24 and we'll decide later which ones are in and which ones
25 are out? Isn't that correct?

1 requirement in the Department's view to give public
2 notice an opportunity for comment. Didn't you say
3 that?

4 A. That's -- my recollection was that the
5 balance of the law said we are not required to do it.

6 Q. Was there anything in the law that said you
7 were required to amend the 401?

8 A. No.

9 Q. So the Port asked for something that Ecology
10 did not have to do, that is, amend the 401 that had
11 already been issued, and Ecology went ahead, going
12 through a process to consider doing that; is that
13 correct?

14 A. Correct.

15 Q. And ultimately did do that?

16 A. Correct.

17 Q. But at the same time, Ecology, because there
18 was no legal requirement to do so, did not give public
19 notice and comment of that process that Ecology had
20 allowed the Port; is that correct?

21 A. Yes, that is correct.

22 Q. Now, I believe you said something about the
23 determination was in part that the public had ample
24 opportunity for review in the PCHB. Presumably you
25 were saying it didn't like what came out of the amended

1 A. I'd have to do more review to be able to
2 answer one way or the other. I gave you my
3 recollection of the higher level understanding of this,
4 and you've taken me to a level of detail that I'd have
5 to either refresh my memory or get more understanding
6 of.

7 Q. Well, who would be someone you would rely on
8 to explain the difference? Would Ray Hellwig?

9 A. Ray Hellwig, Gordon White.

10 Q. So that's something to ask Ray Hellwig about?

11 A. If you wish to, whatever, yes.

12 Q. Okay. Did you understand that any changes
13 were made between the August 401 and the September 401
14 in terms of the conditions for monitoring of wetland
15 hydrology?

16 A. Yes, I do. Again, that -- I recall that that
17 was one of the issues on this issues list, and I
18 engaged in staff discussions with me, with our
19 attorneys on that topic.

20 Q. And is it your understanding that the
21 monitoring condition for wetland hydrology was
22 clarified, as you put it, in the September 401?

23 A. That's an issue where my understanding is
24 that it was improved to the better of the -- in terms
25 of the certainty and the methodology. So I would say

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1 that was an improvement to the August 10th 401.
 2 Q. Well, would you agree that it is important to
 3 have preconstruction monitoring of wetland hydrology?
 4 A. It's all dependent on a -- on the facts of
 5 the case, et cetera. So as a global statement I
 6 wouldn't necessarily approve -- agree with that.
 7 Q. Okay.
 8 A. And I'm not thinking of exactly what it is we
 9 did here. I'm just reacting to a general statement.
 10 Q. Well, what did the August 401 do with regard
 11 to monitoring of wetland hydrology, do you recall?
 12 A. Roughly, I recall it requiring -- the intent
 13 of it was to get data prior to construction. It
 14 presumed that there was no data available, and it was
 15 unclear as to whether or not monitoring had to happen
 16 during and up to a specific season or period of time.
 17 Q. And did the August 401 require monitoring for
 18 wetland hydrology before construction?
 19 A. My recollection is that it required it over a
 20 period of time.
 21 Q. Why don't you take a look at --
 22 A. And I don't know when construction was
 23 related to that period of time.
 24 Q. Why don't you take a look at Exhibit 2,
 25 Page 6, Section G. Do you have the August one there?

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1 A. I do. Exhibit 2. (Witness reviewing
 2 document.)
 3 Okay. I've read it.
 4 Q. Okay. Now, the September one takes out
 5 before construction, doesn't it?
 6 A. If I can look at the September one.
 7 Q. Sure.
 8 A. Do you know where that is?
 9 Q. I think it's actually Page -- what page is
 10 this one on? Page 6? It's on Page 7 probably in the
 11 September one. I think the pagination changed a bit.
 12 A. (Witness reviewing document.)
 13 It does take the term "before construction"
 14 out. I don't see this -- it says, "The Port shall
 15 conduct bimonthly hydrologic monitoring during the wet
 16 season, November through May, before construction."
 17 That's the August. And this one says, "The
 18 Port shall immediately begin conducting twice-monthly
 19 hydrologic monitoring during the wet season, November
 20 through May, and shall continue such monitoring for at
 21 least three years after completion."
 22 Q. Why the change? Do you know?
 23 A. I don't know why, other than our staff in --
 24 I guess suggesting or accepting, recommending to this
 25 change, believed that the monitoring was adequate and

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1 that they didn't originally intend to preclude November
 2 through May, meaning that some construction couldn't
 3 happen. I think that's the substance of the change
 4 here.
 5 Q. In other words, the way the condition was
 6 originally written might inhibit commencement of
 7 construction?
 8 A. And if they changed it, they must not have
 9 meant that in the original 401.
 10 Q. The one that you said was -- how did you put
 11 it, "perfectly" what?
 12 A. You have my words. You can use them as you
 13 wish.
 14 MR. EGLICK: Okay. Thanks. I have no other
 15 questions.
 16 (Deposition concluded at 1:20 P.M.)
 17 (Signature reserved.)
 18
 19
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 24
 25

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1 CORRECTION & SIGNATURE PAGE
 2
 3 RE: ACC V. STATE OF WASHINGTON
 4 PCHB NO. 01-160
 5 DEPOSITION OF: THOMAS FITZSIMMONS,
 6 JANUARY 18, 2002
 7 I, THOMAS FITZSIMMONS, have read the
 8 within transcript taken JANUARY 18, 2002, and the same
 9 is true and accurate except for any changes and/or
 10 corrections, if any, as follows:
 11
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22 Signed at _____,
 23 on the _____ day _____, 2002.
 24
 25 THOMAS FITZSIMMONS

1 REPORTER'S CERTIFICATE

2
3 I, CARLA R. WALLAT, 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 24th day of
20 January 2002.

21
22 CARLA R. WALLAT, RPR, CRR, CCR #WALLCR346BE
23 Notary Public in and for the State
24 of Washington, residing in King
25 County. Commission expires 1/17/06.

A				
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