

**HELLWIG,
RAYMOND**

AR 028579.01

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: Ray Hellwig, Director, Dept. of Ecology Northwest Regional Office

Date of Deposition: January 8, 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's Northwest Regional Office 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 _Hellwig_ deposition are offered by ACC and CASE:

Page 6 through page 38 line 20
Page 67 line 9 through line 14
Page 75 line 16 through page 76 line 18
Page 77 through page 262

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: **Ray Hellwig**

Date of Deposition: **January 8, 2002**

3. Counter Excerpts by Respondent Department of Ecology:¹

START

Page 66, line 20

END

page 67, line 8

4. Objections to Designations by Appellants:

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

General Objection. The appellants' voluminous designation of the last 185 pages is burdensome and fail to offer material or relevant evidence. These last 185 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

¹ By designating counter excerpts, Ecology does not waive its objections to ACC's and CASE' 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' use of particular portions of the transcript. Those objections are identified in subsection 4 of this document.

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.

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

<u>START</u>	<u>end</u>	<u>OBJECTION</u>
Page 9, line 25	page 23, line 3	No relevance to the factual of legal issues before the Board. The activities undertaken by Mr. Hellwig to prepare for his deposition are not relevant to the issues before the Board.
Page 12, line 8	page 12, line 11	Mischaracterizes the witness' testimony. Witness did not use the word "removed", he stated assignments changed.
Page 78, line 22	page 86, line 13	Calls for speculation regarding purpose of meeting; no foundation; mischaracterizes testimony of the witness. Counsel inappropriately takes an assumption of the witness and transforms it into a fact (see ACC/CASE Prehearing Brief at footnote 7)
Page 83, line 16	page 83, line 22	Mischaracterizes the witness' testimony.
Page 84, line 2	page 84, line 9	Calls for hearsay; mischaracterizes the witness' testimony.
Page 85, line 19	page 85, line 25	Mischaracterizes the witness' testimony.
Page 88, line 15	page 88, line 19	Argumentative.
Page 95, line 6	page 95, line 20	Calls for a legal conclusion.
Page 97, line 24	page 98, line 4	Hearsay; calls for speculation.
Page 100, line 22	page 101, line 7	Hearsay; calls for speculation as to what the Port knew.
Page 103, line 21	Page 103, line 23	Mischaracterizes the witness' testimony.
Page 105, line 7	page 105, line 10	Mischaracterizes the witness' testimony. Witness did not use the word "removed".
Page 105, line 25	page 106, line 3	Mischaracterizes the witness' testimony.

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 Ray Hellwig does not attempt to evaluate any facts that are material to showing whether Ecology has reasonable assurance about the Port's 401 certification.

Page 107, line 11	Page 107, line 17	Lack of foundation.
Page 109, line 7	page 111, line 25	No relevance to the factual or legal issues before the Board. Inquiries relate to the argumentative question as to why Mr. Dear was present and to his credentials.
Page 114, line 18	page 114, line 23	Mischaracterizes the witness' testimony.
Page 115, line 10	page 115, line 23	No relevance to the factual or legal issues before the Board.
Page 117, line 10	page 117, line 25	Mischaracterizes the evidence referenced
Page 121, line 15	page 121, line 22	Mischaracterizes the witness' testimony.
Page 121, line 23	page 123, line 9	No relevance to the factual or legal issues before the Board.
Page 125, line 8	page 126, line 11	Mischaracterizes testimony of another witness
Page 130, line 17	page 131, line 5	No foundation.
Page 137, line 12	page 137, line 28	Mischaracterizes witness' testimony; argumentative.
Page 138, line 6	page 138, line 12	Calls for speculation.
Page 138, line 6	page 142, line 3	Mischaracterizes witness' testimony
Page 141, line 4	page 141, line 9	Mischaracterizes the witness' testimony.
Page 141, line 16	page 142, line 3	Argumentative; mischaracterizes the witness' testimony.
Page 142, line 4	page 143, line 4	Argumentative
Page 143, line 17	page 143, line 21	Mischaracterizes the witness' testimony. Witness did not use the word "removed".
Page 144, line 7	page 144, line 11	Mischaracterizes the witness' testimony. Witness did not use the word "removed".
Page 145, line 11	page 146, line 4	Calls for speculation.
Page 147, line 19	page 148, line 1	Hearsay; calls for speculation.
Page 151, line 17	page 151, line 23	Mischaracterizes the witness' testimony. Witness did not use the word "removed".
Page 154, line 25	page 155, line 5	Mischaracterizes the evidence; document does not refer to meeting as "negotiations".
Page 154, line 25	page 156, line 13	Double hearsay.
Page 155, line 14	page 155, line 17	Mischaracterizes the witness' testimony. Witness did not use the word "removed".
Page 156, line 5	page 156, line 13	Mischaracterizes the witness' testimony. Witness

		did not use the word "removed".
Page 159, line 7	page 159, line 14	Lack of foundation.
Page 162, line 9	page 162, line 20	Argumentative
Page 164, line 11	page 164, line 15	Mischaracterizes the witness' testimony.
Page 166, line 17	page 167, line 17	No relevance to the factual or legal issues before the Board.
Page 169, line 7	page 169, line 19	Argumentative.
Page 170, line 16	page 172, line 24	No relevance to the factual of legal issues before the Board.
Page 173, line 15	page 174, line 2	Mischaracterizes the witness' testimony
Page 179, line 16	page 180, line 2	Argumentative.
Page 182, line 10	page 182, line 24	No relevance to the factual or legal issues before the Board.
Page 190, line 1	page 191, line 20	No relevance to the factual or legal issues before the Board.
Page 198, line 24	page 199, line 4	Argumentative.
Page 198, line 24	page 208, line 22	No relevance to the factual or legal issues before the Board.
Page 199, line 17	page 199, line 23	Lack of foundation for personal knowledge.
Page 200, line 25	page 201, line 5	Calls for speculation.
Page 201, line 17	page 201, line 22	Lack of foundation.
Page 206, line 4	page 206, line 13	Mischaracterizes the witness' testimony.
Page 206, line 22	page 207, line 1	Argumentative, mischaracterizes the witness' testimony.
Page 208, line 20	page 208, line 24	Argumentative, no relevance to the factual or legal issues before the Board.
Page 211, line 3	page 211, line 6	Mischaracterizes the evidence.
Page 211, line 9	page 211, line 20	Hearsay.
Page 212, line 17	page 212, line 23	Calls for speculation..
Page 214, line 19	page 215, line 2	No relevance to the factual or legal issues before the Board.
Page 215, line 24	page 216, line 7	Hearsay.
Page 218, line 18	page 227, line 23	No relevance to the factual or legal issues before the Board.
Page 219, line 1	page 219, line 15	Mischaracterizes the witness' testimony.

Page 226, line 16 page 227, line 12 Calls for speculation; argumentative.
Page 245, line 7 page 245, line 10 Calls for a legal conclusion.
Page 246, line 16 page 247, line 2 Calls for a legal conclusion.
Page 249, line 16 page 249, line 18 Argumentative.
Page 261, line 23 page 262, line 16 Hearsay.

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: Ray Hellwig, Director, Dept. of Ecology Northwest Regional Office

Date of Deposition: January 8, 2002

Response to General Objections:

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 announced 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.

Finally, the Board should note that Mr. Hellwig, Director of Ecology’s Northwest Regional Office, was from all accounts the key Ecology official supervising the 401 certification process. He was Ecology’s lead representative at virtually every meeting with the Port and its consultants concerning the 401. Yet, Ecology failed to present his testimony at the hearing and now (inappropriately) seeks to prevent the Board from reading significant portions of his deposition testimony.

Responses to Specific Objections:

<u>Start</u>	<u>End</u>	<u>Response to Objection</u>
9:25	23:3	Ecology’s objection mischaracterizes the testimony: it does not concern solely or even chiefly “activities undertaken by Mr. Hellwig to prepare for his deposition,” but in fact concerns the removal of Tom Luster from Ecology’s “401 team.” Ecology made affirmative assertions to the Board in testimony and argument concerning the composition of this team as part of its claim that deference was due. This testimony is clearly relevant.

12:8	12:11	The objection is apparently to a question: however, no objection was made at the deposition. The objection is therefore waived.
78:22	86:13	Objections concerning the question (e.g., calls for speculation, no foundation, mischaracterizes testimony) were not made at the deposition and have been waived. In effect, Ecology's objections are an after-the-fact attempt to rewrite the witness' testimony, which is particularly damaging and contradictory to Ecology's testimony and argument in the trial before the Board.
83:16	83:22	Once again, this objection was not made at the deposition and was waived.
84:2	84:9	These objections were waived. Further, the hearsay objection is inappropriate: the question asked for the witness' understanding.
85:19	85:25	No objection made at deposition: waived. The objection is not well-founded in any event. The Board can read the testimony and determine for itself whether the question mischaracterizes the witness' testimony.
88:15	88:19	No objection was made at deposition: waived.
95:6	95:20	After the objection was made, the question was reformulated to ask for Mr. Hellwig's understanding as the head of the Department of Ecology Northwest Regional Office. Similar questions were repeatedly asked of Ecology's witnesses by Ecology and the Port itself during the trial.
97:24	98:4	Objection waived: no objection made at deposition. The witness testified as to his understanding.
100:22	101:7	Objection waived: no objection made at deposition. Further, the witness explicitly answered the question not in terms of what the Port knew but in terms of what Ecology did.
103:21	103:23	Objection waived: no objection made at deposition. Further, the witness went on to answer the question and explain how it was that the Director ended up driving all the way from Lacey to a meeting concerning the 401 at the Port's headquarters on Pier 69 in Seattle.

105:7	105:10	Objection waived: no objection made at deposition. The witness did not state that he misunderstood the question or objected to the use of the term “removal.” Either he or his counsel could easily have done so.
105:25	106:3	Objection waived: no objection made at deposition. Further, no specific objection is made now as to the nature of the purported mischaracterization.
107:11	107:17	An adequate foundation was laid: the prior question elicited the fact that Tom Luster, the State’s senior 401 expert, had not been brought to the meeting with the Port even prior to his removal.
109:7	111:25	Objections waived: none made at deposition. Further, the information is clearly relevant, particularly in light of Ecology’s repeated claims and testimony that deference is appropriate because the 401 decision was made by a well-qualified team of experts. The question here goes directly to the question of whether Joe Dear, the Governor’s Chief of Staff, had any expertise or credentials which would support his involvement in Ecology’s decision-making process.
114:18	114:23	The objection, which was made at the deposition, was cured by the subsequent question beginning on line 24.
115:10	115:23	ACC will withdraw its designation of these lines.
117:10	117:25	It is not an appropriate objection that a question mischaracterizes evidence: that is a matter for the Board to evaluate as it reads the testimony and for the witness to address in his response. The witness’ response reflects that the objection of mischaracterization was not necessarily well-founded (the witness acknowledges that “there were some mixed views” with respect to the fill criteria).
121:15	121:22	Ecology has repeatedly in testimony and argument touted its process in adopting the 401, and asserted the process and the participants in it as a basis for finding reasonable assurance. This testimony is directly relevant to whether Ecology’s claim is supportable in the actual factual record.
121:23	123:9	Ecology has repeatedly in testimony and argument touted its process in adopting the 401, and asserted the process

and the participants in it as a basis for finding reasonable assurance. This testimony is directly relevant to whether Ecology's claim is supportable in the actual factual record.

- 125:8 126:11 The objection (one of the few actually made by Ecology at the deposition) was cured by a hypothetical question asked at p. 126 line 12.
- 130:17 131:5 The question and answer were withdrawn based on the follow-up question asked at p. 131 line 6.
- 137:12 137:28 Objection waived: no objection made at deposition. In addition, there is no line 28 of page 137 of Mr. Hellwig's deposition.
- 138:6 138:12 Objection waived: no objection made at deposition. None of the questions included in Ecology's objection call for speculation, but instead ask for specific recollections.
- 138:6 142:3 No specific identification is given of the supposed mischaracterization of witness' testimony included in the four pages to which Ecology asserts a general objection. Therefore, it is impossible to respond.
- 141:4 141:9 Objection waived: no objection made at deposition. The question asked Mr. Hellwig to explain his testimony. He did so. There is no basis for the objection in any event.
- 141:16 142:3 Objection waived: no objection made at deposition. No specific mischaracterization is identified. Ironically, much of what Ecology has asked to strike claiming it "mischaracterizes the witnesses' testimony" is nine lines of the witness' own testimony. Clearly the objection here is more to what Mr. Hellwig, head of the Northwest Regional Office, had to say, than to the question which was asked.
- 142:4 143:4 Objection waived: no objection made at deposition. Mr. Hellwig's concession -- that, although he made key decisions on the 401, he was not trained in making recommendations with respect to reasonable assurance, while Mr. Luster was -- is not argumentative, nor are the questions leading to that admission.
- 143:17 143:21 Objection waived: no objection made at deposition. The witness was perfectly capable of responding to the question and indicating that he did not understand or agree with any

word used in the question: the witness did not do so. It is inappropriate for the witness' counsel to do so months later.

- 144:7 144:11 Objection waived: no objection made at deposition. The witness was perfectly capable of responding to the question and indicating that he did not understand or agree with any word used in the question: the witness did not do so. It is inappropriate for the witness' counsel to do so months later.
- 145:11 146:4 A hypothetical question is permissible.
- 147:19 148:1 Objection waived: no objection made at deposition. Further, the answer itself reflects that the question did not call for hearsay, and the witness did not give hearsay in his response.
- 151:17 151:23 Objection waived: no objection made at deposition. Further, the witness answered the question without any objection or confusion as to the use of the term "removed."
- 154:25 155:5 Objection waived: no objection made at deposition. Further, the objection actually mischaracterizes the evidence. The deposition transcript further reflects that the term "negotiation" was used to apply to the meetings.
- 154:25 156:13 The objection does not specify what portions of the testimony are purportedly "double hearsay." Questions were asked Mr. Hellwig to elicit his recollection and chronology of what occurred. His first-hand statements in response to those questions are not double hearsay.
- 155:14 155:17 Objection waived: no objection made at deposition. Ecology's objection to calling Mr. Luster's removal a removal did not apparently arise until after Mr. Hellwig's deposition, since Mr. Hellwig did not object or correct the term.
- 156:5 156:13 Objection waived: no objection made at deposition. Further, as with many others, it is frivolous. The witness was explicitly asked, "Removed from responsibility for the Sea-Tac project; is that correct?" And the witness explicitly answered, "That's correct." The witness had every opportunity to correct the record if the characterization was not accurate.

159:7	159:14	The objection was cured in the following question commencing at p. 159, line 11.
162:9	162:20	Objection waived: no objection made at deposition. No identification has been made of any “argumentative” portion of the question, which is a straightforward one concerning the witness’ knowledge of who prepared a particular document.
164:11	164:15	Objection waived: no objection made at deposition. Further, no specification has been given here as to how the witness’ testimony, which is straightforward, has been mischaracterized (it has not).
166:17	167:17	Once again, this is directly relevant to Ecology’s repeated claims in testimony and oral argument before the Board from several witnesses and attorneys that the expertise of those participating in its decision-making process, and the process itself, require that the Board grant it substantial deference. Ecology cannot make these claims and offer evidence on them, and then object to inclusion of evidence reflecting the actual nature of the process.
169:7	169:19	Objection waived: no objection made at deposition.
170:16	172:24	Once again, Ecology objects to a document directly relevant to the testimony and evidence it has presented to the Board. The Board is entitled to know the full story of how the 401 came about, particularly in light of Ecology’s repeated claims that deference should be given to what Ecology characterizes as a decision made by its team of technical experts. The testimony here goes directly to the marginalization of Ecology’s senior toxics engineer Pete Kmet from matters concerning the 401.
173:15	174:2	Objection waived: no objection made at deposition. No mischaracterization in the transcript, as the Board can see from reading it.
179:16	180:2	The objection, although asserted at the deposition, was not well-taken, as is evident from the transcript.
182:10	182:24	Objection waived: no objection made at deposition. The relevance is as discussed above in response to other objections.

190:1	191:20	The relevance is as described above in response to other objections, and relates to Ecology's decision regarding whether a water right is required, and the impetus and background for that decision.
198:24	199:4	Objection waived: no objection made at deposition. No identification has been made of what aspects of the questions asked are argumentative.
198:24	208:22	Ecology essentially argues here that the Board is not entitled to know in evaluating whether Ecology had reasonable assurance the reasons why Ecology revoked its August 10 401 and substituted a (weaker) 401 a month later. Mr. Hellwig's deposition here clearly provides relevant information as to the basis on which that occurred. It is startlingly different from the bases suggested in testimony, evidence, and oral argument to the Board at trial.
199:17	199:23	Objection waived: no objection made at deposition. Further, the witness testified based on his personal knowledge and understanding.
200:25	201:5	Objection waived: no objection made at deposition. If objection had been made, counsel could have clarified the basis for Mr. Hellwig's response, which he affirmatively stated was based on his "understanding."
201:17	201:22	The objection is not well-founded. The witness had been through the chronology. A summary, wrap-up question was asked to which the witness responded in establishing the context for his prior answers.
206:4	206:13	ACC withdraws the designation.
206:22	207:1	Objection waived: no objection made at deposition. Further, the witness himself explained what part of the question he disagreed with (see p. 207, lines 3-8).
208:20	208:24	ACC withdraws the designation.
211:3	211:6	Objection waived: no objection made at deposition. Further, the witness clearly understood and responded to the question without disagreeing with its premise. Ecology has offered no basis for its belated objection.

211:9	211:20	Objection waived: no objection made at deposition. Further, Mr. Hellwig's testimony concerning Exhibit 100 is not hearsay, nor is the document itself produced by Ecology hearsay.
212:17	212:23	Objection waived: no objection made at deposition. Further, Mr. Hellwig's candid responses that cost issues did affect Ecology's decision not to accept the Kmet/TCP guidance on contaminated fill sampling is not speculation, nor is it presented as such by Mr. Hellwig, who speaks in terms of what he is "recalling."
214:19	215:2	Once again, the facts concerning how the 401 came about are directly relevant, particularly in light of evidence, testimony and argument presented by Ecology.
215:24	216:7	Admission and prior inconsistent statements are exceptions to the hearsay rule. Both apply here in light of the evidence, testimony and argument which Ecology has presented on the basis for the 401.
218:18	227:23	See responses above concerning relevancy of process. Further, testimony Mr. Hellwig presented concerning the origin and interpretation of the retrofit schedule in the 401 certification are directly relevant to issues before the Board.
219:1	219:15	Objection waived: no objection made at deposition. Further, no specification is given as to how the witness' testimony has been mischaracterized. The witness gives no indication that it has been in his responses.
226:16	227:12	Objection waived: no objection made at deposition. Ecology has still not explained how testimony concerning the origin and interpretation of the retrofit condition in the 401 can be speculative or argumentative in light of the extensive testimony which Ecology and the Port presented on this issue at trial. It appears that Ecology has objected simply because the testimony given by the Director of the Northwest Regional Office is not consistent with the claims and arguments made by Ecology to the Board elsewhere.
245:7	245:10	Objection waived: no objection made at deposition. Further, the question does not ask for a legal interpretation, but for the witness to give his understanding of the facts and chronology concerning the 401.

246:16 247:2 Objection waived: no objection made at deposition. Further, the question does not ask for a legal interpretation, but for the witness to give his understanding of the facts and chronology concerning the 401.

249:16 249:18 Objection waived: no objection made at deposition. No specification given as to basis for "argumentative" objection: the question and answer elucidate an important issue for the Board.

261:23 262:16 Testimony concerning statements by Ecology experts inconsistent with or constituting admissions when compared with Ecology's position before the Board come in as exceptions to the hearsay rule. Here, Mr. Hellwig is acknowledging that a key Ecology official, Bob Barwin, argued that a water right is required for the Port's low flow plan, which squarely falls within the hearsay exceptions. Further, regarding p. 262, lines 3-5: Bob Barwin testified at the hearing in response to a question by Ecology counsel that he agreed that "the director made the correct decision" not to require a water right; these lines are impeachment for that statement.

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Ray Hellwig

January 8, 2002

ACC v. DOE

01-160

CONDENSED TRANSCRIPT AND CONCORDANCE
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COPY

JAN 11 2002

AR 028597

1 POLLUTION CONTROL HEARINGS BOARD

2

3 AIRPORT COMMUNITIES COALITION,)

4 Plaintiff,)

5 vs.) NO. 01-160

6 DEPARTMENT OF ECOLOGY and THE)

7 PORT OF SEATTLE,)

8 Defendants.)

9 DEPOSITION UPON ORAL EXAMINATION

10 OF

11 RAY HELLWIG

12 10:00 A.M.

13 JANUARY 8, 2002

14 1325 FOURTH AVENUE, SUITE 1500

15 SEATTLE, WASHINGTON

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22

23

24 MARY L. GREEN, CCR, RPR

25 CSR NO. GREENML497RZ

JAN 11 2002

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25

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4

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6 81. Memo to Joe Dear from Ray Hellwig dated 77

7 May 12, 2000, Subject: May 16 Meeting

8 with Port of Seattle (POS)-re the Third

9 Runway

10 82. E-mail to Raymond Hellwig from Steve 86

11 Alexander dated February 8, 2000, Re:

12 Fill Criteria for the Third Runway

13 83. E-mail to Tom Luster from Raymond Hellwig 92

14 dated May 15, 2000, Subject: May 16

15 Meeting with the Port of Seattle-the

16 Third Runway

17 84. E-mail to Thomas Fitzsimmons from Raymond 95

18 Hellwig dated May 19, 2000, Subject:

19 SeaTac 3rd Runway

20 85. E-mail to Tom Luster from Raymond Hellwig 118

21 dated September 6, 2000, Subject: Use of

22 Contaminated Fill for Sea-Tac Third

23 Runway Project

24 86. E-mail to Raymond Hellwig from Tom Luster 120

25 dated October 6, 2000, Subject: Lessons

Learned from Big Projects-the official

version

87. E-mail to Raymond Hellwig from Tom Luster 138

dated October 18, 2000, Subject: SeaTac

88. E-mail to Rachel McCrea from Ann Kenny 149

dated October 24, 2000, Subject: Third

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89. E-mail to Ann Kenny from Raymond Hellwig 152

dated October 26, 2000, Subject: 3rd

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1 90. E-mail to Raymond Hellwig from Joan 4

2 Marchioro dated November 22, 2000,

3 Subject: New Method A Soil Cleanup Levels 166

4 91. Fax to Ann Kenny from Yvonne Oliva 166

5 dated 10/6/00; Letter to M. R. Dinsmore

6 from Tom Fitzsimmons dated September

7 28, 2000

8 92. Memo to Gary Zeiler from Ray Hellwig 170

9 dated May 12, 2000

10 93. E-mail to Thomas Fitzsimmons from Raymond 175

11 Hellwig dated May 17, 2001, Subject:

12 Discussion Paper

13 94. E-mail to Raymond Hellwig from Ann Kenny 177

14 dated July 29, 2001, Subject: Deliberative

15 Do Not Disclose, Preliminary Draft 401

16 WQC for Third Runway

17 95. E-mail to Dianne Pastore from Thomas 184

18 Fitzsimmons dated August 1, 2001, Subject:

19 Seattle editorialists (by phone) about

20 the 3rd-runway decision & Tom's schedule

21 on August 9

22 96. E-mail to Raymond Hellwig from Dianne 191

23 Pastore dated August 2, 2001, Subject:

24 Briefing material for Governor

25 97. Draft memo to Tom Fitzsimmons from Ray 193

Hellwig dated 8/6/01, Subject: Briefing

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98. News Release dated August 9, 2001 195

99. Overriding messages dated 8/16/2001 198

100. E-mail to Andrea Grad from Ann Kenny 209

dated October 13, 2001, Subject: SeaTac

101. E-mail to Tom Fitzsimmons from Raymond 210

Hellwig dated August 16, 2001, Subject:

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1 102. E-mail to Raymond Hellwig from Curt Hart 219
 2 dated August 27, 2001, Subject: Draft
 Talking Points: Third Runway Permit Appeal
 3 103. Phone message to Ray from Joan Marchioro 231
 4 dated 8/28; handwritten notes
 5 104. E-mail to Thomas Fitzsimmons from Raymond 243
 6 Hellwig dated September 24, 2001, Subject:
 NW Update
 7 105. E-mail to Kevin Fitzpatrick from Ann Kenny 251
 8 dated October 23, 2001, Subject: Processed
 9 Materials
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1 SEATTLE, WASHINGTON; TUESDAY, JANUARY 8, 2002
 2 10:00 A.M.
 3 --oOo--

4 RAY HELLWIG
 5
 6 sworn as a witness by the Notary Public,
 7 testified as follows:

EXAMINATION

8
 9
 10 BY MR. EGLICK:
 11 Q. Will you state your full name for the record,
 12 please.
 13 A. Raymond Kenneth Hellwig.
 14 Q. And your residential address?
 15 A. Is 1137 Southwest 320th Place in Federal Way,
 16 and that's 98023.
 17 Q. Have you ever had your deposition taken
 18 before?
 19 A. I have.
 20 Q. How many times?
 21 A. I believe it was two or three times.
 22 Q. And in what circumstances?
 23 A. It was related to some decisions that we made
 24 on applications for water rights. The decisions were
 25 made back in '95, I believe, and so the depositions

1 probably would have occurred in '96 or '97.
 2 Q. Were those depositions, the two or three
 3 depositions you referred to, in PCHB proceedings?
 4 A. Yes.
 5 Q. And what were the names of those proceedings?
 6 A. I'm not recollecting all of them. We made
 7 dozens of decisions, and several of them were appealed.
 8 Ones that come to mind, for instance, that went on to
 9 further appeal was Postema and King County Black
 10 Diamond. There were just numerous cases. I'm not
 11 recalling all the names.
 12 Q. There were numerous cases in which your
 13 deposition was taken?
 14 A. I believe that it was under a circumstance
 15 where the appellants formed together in a group, and so
 16 the depositions were taken such that I believe they
 17 applied to several cases.
 18 Q. Postema being one of the cases?
 19 A. One of the --
 20 Q. King County Black Diamond being another?
 21 A. I believe so.
 22 Q. And you said two or three times for your
 23 deposition.
 24 A. I don't remember the exact number.
 25 Q. Can you recall a third time your deposition

1 was taken?
 2 A. Not specifically.
 3 Q. You understand the procedure here. I ask
 4 questions. You answer unless your counsel instructs
 5 you not to answer. The court reporter takes down the
 6 proceedings. Do you understand that?
 7 A. Yes.
 8 Q. And you understand you're under oath?
 9 A. Yes.
 10 Q. And you understand that if you don't
 11 understand a question you should let me know so that I
 12 can make sure that the question is understandable
 13 before you proceed to answer it?
 14 A. Yes, I do.
 15 Q. Did you engage in any preparation for this
 16 deposition?
 17 A. Could you explain more what you mean by
 18 preparation?
 19 Q. Did you do anything in the course of your
 20 business that you would not have done but for the fact
 21 that you were going to be deposed?
 22 A. Yes.
 23 Q. What was that?
 24 A. Well, a few weeks ago when I was informed
 25 that a deposition would occur, I did go back through

1 some of my notes to refamiliarize myself with some of
2 the key areas of concern pertinent to the decision we
3 made.

4 Q. And are those notes that are kept in a file
5 in your office?

6 A. Yes.

7 Q. And are all of those notes notes that have
8 been produced to Airport Communities Coalition?

9 A. Yes.

10 Q. And are they in handwritten form?

11 A. Some handwritten. I believe most of what I
12 would have looked at then were typed documents; for
13 example, briefing documents.

14 Q. And who were the notes prepared by?

15 A. Most of those notes would have been prepared
16 by me.

17 Q. If they weren't prepared by you, who were
18 they prepared by?

19 A. Well, my files with my notes also include
20 e-mail documents initiated by other ecology employees
21 and perhaps external sources.

22 Q. In the course of preparation, did you review
23 any document that has not been produced to ACC?

24 A. No.

25 Q. Was that all that you did in preparation for

1 recall events and to get my own memory clear on a few
2 key issues.

3 Q. Did any of those events include contacts with
4 the Port of Seattle?

5 A. The events that we discussed?

6 Q. Yes.

7 A. Not that I recall.

8 Q. What about contacts with the governor's
9 office?

10 A. There may have been reference to meetings
11 that we'd had at the governor's office. This was a
12 fairly brief conversation, sort of an overview.

13 Q. Was there any reference to Tom Luster?

14 A. I don't think so.

15 Q. Have you talked to anyone affiliated with the
16 port about anything concerning your deposition?

17 A. I'm thinking about the previous question
18 about Tom Luster, and I'm thinking about the
19 conversation, the brief conversation I had with Tom.
20 It's possible --

21 Q. You mean Tom Fitzsimmons?

22 A. Tom Fitzsimmons. It's possible -- I don't
23 recall specifically -- that we had discussions about
24 assignments made for the 401 coordination function, and
25 Tom Luster's name may have come up in that context, but

1 this deposition?

2 A. Well, I've had conversations in passing with
3 others who were also going to be deposed, but I
4 wouldn't characterize those conversations as deposition
5 preparation, but there have been other conversations
6 about the depositions with ecology employees, and I've
7 had conversations with my attorney.

8 Q. Which ecology employees have you had
9 conversations with about the deposition?

10 A. Well, I've had conversations with several
11 employees regarding the fact that we were going to be
12 deposed, but not in a manner to necessarily prepare for
13 the depositions. But individuals that I've talked to
14 about the depositions include Ann Kenny. I traded
15 voice messages with Gordon White, had a brief
16 conversation with Tom Fitzsimmons.

17 Let me think. Dan Swenson, maybe one or two
18 words with him, perhaps just a very few words with
19 Kevin Fitzpatrick, and of course my assistant, Nancy
20 Groves, who helps me manage my schedule. There could
21 be others, but they're not coming to mind right now.

22 Q. What did you talk with Tom Fitzsimmons about?

23 A. I reviewed with him some of the key areas of
24 concern that we've dealt with over the last many months
25 for purposes of -- I think in part just trying to

1 I'm not recalling specifically.

2 Q. What do you mean by assignments made?

3 A. The ecology staff person assigned
4 responsibility for coordinating with program experts
5 for purposes of pulling information together and
6 writing a recommendation with respect to reasonable
7 assurance and a 401 water quality certification.

8 Q. Tom Luster was removed from the assignment on
9 the 401 for the Sea-Tac project, was he not, in October
10 2000?

11 A. I think that was the time frame.

12 Q. What was the reason that you talked with Tom
13 Fitzsimmons about it? Was this in the last few weeks
14 you talked to Tom Fitzsimmons?

15 A. It would have been the last few weeks.

16 Q. So in the last few weeks, you're testifying
17 that you talked with Tom Fitzsimmons, and you're saying
18 that reassignment of Tom Luster may have come up in the
19 conversation; is that correct?

20 A. Yes.

21 Q. Now, what does the reassignment of Tom Luster
22 have to do with your conversation with Tom Fitzsimmons?

23 A. Well, as I mentioned, the conversation was
24 brief. It was an overview of key areas of concern a.
25 issues that relate to the runway decision, and one of

1 the issues that could come up in a discussion about
2 that decision would be the roles and responsibilities
3 of different ecology staff, and there was a change made
4 as you just mentioned in responsibility for the 401
5 coordination function.

6 Q. Did you talk with Mr. Fitzsimmons about the
7 reasons that that change was made in October 2000?

8 A. We may have.

9 Q. You may have?

10 A. I don't recall specifically.

11 Q. How long ago was this conversation with
12 Mr. Fitzsimmons?

13 A. A few weeks ago.

14 Q. How often do you speak with the director of
15 -- Mr. Fitzsimmons is director of the Department of
16 Ecology, isn't he?

17 A. That's correct.

18 Q. How often do you speak to him?

19 A. Fairly routinely.

20 Q. Fairly routinely is how often?

21 A. Not every day. It depends on what is
22 happening in the region, what issues are at hand.

23 Q. Let me ask you this. Today is January 8.
24 When was the last time you talked to Mr. Fitzsimmons?

25 A. He was involved in a conference call, a

1 senior management team conference call, on Monday. I'm
2 losing track of days here. So that's yesterday.

3 Q. And prior to that --

4 A. Along with several other members of senior
5 management team, so I think our only direct
6 communication in that conversation was, hi, how you
7 doing?

8 Q. Now, was this conversation that you're
9 describing where Tom Luster came up a conversation on a
10 conference call with other people?

11 A. No. I was in Olympia or Lacey rather, and I
12 had a brief meeting with Tom in his office.

13 Q. And when was this?

14 A. I would have to look at my calendar for the
15 exact date.

16 Q. Do you have your calendar here?

17 A. No, I do not.

18 Q. Was it before or after Christmas?

19 A. Before.

20 Q. How did you happen to be in the director's
21 office for a meeting?

22 A. Well, I was down there for more than one
23 meeting, and I don't remember what the other meeting
24 was. I would have to look at my calendar.

25 Q. Well, how did you happen to end up with a

1 meeting with the director in his office?

2 A. I asked for it.

3 Q. And what was on the agenda for the meeting?

4 A. The agenda for the meeting with him was to
5 briefly go over key areas of concern related to the
6 runway decision to clarify for myself my own memory of
7 events in part for purposes of this deposition.

8 Q. So you asked for a meeting with the director
9 so that you could augment your memory of things that
10 you had been involved in with regard to the third
11 runway decision?

12 A. In part.

13 Q. Was anyone else in the room for this meeting?

14 A. No.

15 Q. Did you take any notes at the meeting?

16 A. No.

17 Q. Did the director take any notes at the
18 meeting?

19 A. I don't recall that he did. I don't believe
20 he did.

21 Q. Now, with regard to Tom Luster, how would the
22 director be able to augment your memory for your
23 deposition of how Tom Luster happened to be replaced on
24 the Sea-Tac project?

25 A. If there was discussion about Tom

1 specifically, it would have been brief, and as a matter
2 of just running through a list of items or issues, it
3 was just one of them.

4 MR. EGLICK: Let's stop for a minute, please.
5 (Discussion off the record.)

6 MR. EGLICK: We took a break because there
7 was a ringing cell phone, and I think we've gotten that
8 taken care of now. Could you read back the last
9 question, please?

10 (The reporter read back as requested.)

11 Q. (BY MR. EGLICK) Mr. Hellwig, I'd ask you to
12 answer that question, please.

13 A. If we discussed it, then I would have
14 probably summarized my recollection of the situation,
15 and he may or may not have commented and nodded his
16 head, and then we moved on to the next item.

17 Q. I'm going to ask the court reporter to read
18 back the question again, and I'd ask you to answer my
19 question.

20 MR. EGLICK: If you could read it back again,
21 please.

22 (The reporter read back as requested.)

23 THE WITNESS: One more time, please.

24 (The reporter read back as requested.)

25 A. I think my response was -- and I'll say it

1 again and try to add to it -- is that if I summarize my
2 recollection of events, then he may or may not be able
3 to tell me if that was consistent with what he
4 recalled.

5 Q. Would Mr. Fitzsimmons to your knowledge have
6 any involvement in the replacement of Tom Luster?

7 A. He would have known about it, of course. He
8 did not make the decision. That decision was made by
9 Gordon White, program manager for the Shorelines and
10 Environmental Assistance Program.

11 Q. Did Mr. Fitzsimmons have any involvement in
12 the decision to replace Tom Luster to your knowledge?

13 A. No, he did not.

14 Q. And how do you know that?

15 A. I'm not aware of him having any involvement.
16 My understanding is the decision was made by Gordon
17 White, program manager of the shorelines and
18 environmental assistance program.

19 Q. How do you know that?

20 A. Because I work with Gordon and I talk to
21 Gordon.

22 Q. And did you have any involvement with the
23 decision to replace Tom Luster?

24 A. I talked to Gordon about it.

25 Q. Before the decision was made?

1 A. Yes.

2 Q. Did you talk to Tom Fitzsimmons about it
3 before the decision was made?

4 A. No.

5 Q. Do you know if anyone else talked to Tom
6 Fitzsimmons -- you have to wait until I finish my
7 question. Do you know if anyone else talked to Tom
8 Fitzsimmons about it before the decision was made?

9 A. I have no knowledge of anybody talking to Tom
10 Fitzsimmons about it before the decision was made.

11 Q. So you don't know either way?

12 A. My understanding of the circumstances and the
13 situation would be that nobody talked to Tom
14 Fitzsimmons before the decision was made.

15 Q. When you say nobody, you mean nobody in
16 ecology?

17 A. Nobody, period. Nobody at ecology and nobody
18 else.

19 Q. Nobody from or affiliated with the port?

20 A. No.

21 Q. Had you heard complaints from the port about
22 Tom Luster's performance?

23 A. I had heard concern expressed by the port
24 about Tom Luster.

25 Q. Were they complaints?

1 A. They could be categorized as complaints.

2 Q. Did you categorize them as complaints?

3 A. I'd categorize them as concerns.

4 Q. And what's the difference between a concern
5 and a complaint?

6 A. I'd say that a complaint would be one step
7 beyond concern; that you think there's a problem that
8 needs to be dealt with.

9 Q. So as far as you knew, the port didn't think
10 there was a problem with Tom Luster's performance; is
11 that correct?

12 A. I think the port had some concerns with Tom's
13 approach to the review of their application for the
14 401.

15 Q. But those concerns as far as you knew were
16 not so serious as to be problems with his approach,
17 were they?

18 A. No. Perhaps potential problems, but, again,
19 they were concerns that they had with his approach.

20 Q. So there were no problems that the port
21 identified with his approach; is that correct?

22 A. There may have been problems, but I would
23 have to go back and look and see if I have notes that
24 reflect that there was something that would be
25 categorized or classified as a problem. There could

1 have been.

2 Q. Now, you said you reviewed your notes in
3 preparation for this deposition; is that correct?

4 A. I went over notes or documents that I had
5 prepared before that you have copies of a few weeks
6 back when I became aware that I was going to be
7 deposed.

8 Q. And you talked with other people about your
9 deposition; is that correct?

10 A. I talked in passing with several people about
11 the fact that these depositions would occur.

12 Q. Well, the meeting with Tom Fitzsimmons wasn't
13 in passing.

14 A. And Tom Fitzsimmons, as I think I already
15 answered, we had a conversation about some of the key
16 areas of concerns, issues relating to the decision.

17 Q. And Tom Fitzsimmons' office is in Lacey or
18 Olympia; is that right?

19 A. That's correct.

20 Q. And your office is where?

21 A. Bellevue.

22 Q. So you didn't just pass Tom Fitzsimmons, did
23 you?

24 A. No. I went down there to meet with him, and
25 I had other meetings as well that day.

1 Q. So after all that preparation, based on that
 2 preparation and your memory, do you have any
 3 recollection today of problems that the port had with
 4 Tom Luster's approach to the 401 decision?
 5 A. No. I wouldn't call it problems. I don't
 6 recall seeing in my notes -- and it wasn't -- I didn't
 7 spend a lot of time going over my notes in preparation
 8 for the deposition. I looked over briefing documents
 9 that had been prepared for previous meetings in the
 10 past because they summarize the key areas of concern,
 11 and I don't recall in looking at any of those materials
 12 any indication specifically of the port having a
 13 problem with Tom Luster.
 14 That doesn't mean the port didn't have a
 15 problem with Tom Luster. What was conveyed to me by
 16 the port throughout the decision-making process related
 17 to the runway would be -- I would categorize as
 18 concerns.
 19 Q. And you think there's a difference between
 20 concerns and problems; is that correct?
 21 A. Yes.
 22 Q. And you think there's a difference between
 23 concerns and complaints; is that correct?
 24 A. Yes.
 25 Q. Now, getting back to your meeting with

1 Mr. Fitzsimmons, when you described your recollection
 2 of how Tom Luster was replaced, isn't that something
 3 you told me you did with Mr. Fitzsimmons?
 4 A. I think it's possible that we did. I'm not
 5 remembering the specifics of the conversation, but it's
 6 very likely if I went over the key areas of concerns
 7 and issues, it's possible that we had some discussion
 8 about the change in assignment for the 401 coordination
 9 work.
 10 Q. And did Mr. Fitzsimmons have any response to
 11 that?
 12 A. I don't remember.
 13 Q. How long did your meeting with
 14 Mr. Fitzsimmons last?
 15 A. Several minutes.
 16 Q. How many is several?
 17 A. Anywhere from 10 to 20.
 18 Q. Did you talk with Mr. Fitzsimmons about the
 19 governor or the governor's staff or office involvement
 20 in the 401 process?
 21 A. I think there was a brief mention of the
 22 meetings we had with the governor's chief of staff
 23 where Mic Dinsmore and Gina Marie Lindsey would have
 24 been present from the port and --
 25 Q. Go ahead.

1 A. So there may have been reference to that
 2 meeting and other meetings that we had with the
 3 governor's chief of staff.
 4 Q. Now, who is the governor's chief of staff?
 5 A. At the time it was Paul Isaki.
 6 Q. Paul I-s-a-k-i?
 7 A. I believe that's it.
 8 Q. Isaki?
 9 A. Yes.
 10 Q. And Mic Dinsmore, who is he?
 11 A. He's the executive director of the Port of
 12 Seattle.
 13 Q. And who is Gina Marie Lindsey?
 14 A. She's the manager of Sea-Tac airport.
 15 Q. What's your educational background,
 16 Mr. Hellwig?
 17 A. I have a Bachelor's degree in political
 18 science and a Master's degree in business
 19 administration.
 20 Q. And where are those from and when did you get
 21 them?
 22 A. Graduated from Central Washington University
 23 in 1975, and my MBA from University of Puget Sound was
 24 '82, I believe.
 25 Q. Did you have a major other than political

1 science at CWU or was that it?
 2 A. CWU was a Bachelor's degree, and, yes, my
 3 major was political science, other courses in economics
 4 and history.
 5 Q. Now, you were in the Marines then, weren't
 6 you?
 7 A. Yes, I was.
 8 Q. When was that?
 9 A. From 1968 into 1970.
 10 Q. So that was prior to going to CWU?
 11 A. After I got out of the Marine Corps, I worked
 12 at a cement plant for about a year and a half. Then I
 13 started school at Shoreline Community College, received
 14 an AA degree there, transferred to Central Washington
 15 University, and started working for the state, I
 16 believe, in 1976.
 17 Q. So '76 after you got your BA, that was your
 18 first job out was with the state?
 19 A. No. I worked -- let me try and remember
 20 here. I worked at a 7-Eleven store. I worked at
 21 Aurora Rents. A friend of mine owns that business. He
 22 has a --
 23 Q. So '76 was your first job with the state,
 24 though?
 25 A. Yes.

1 Q. And where was that, what department?
 2 A. That was with Department of Licensing.
 3 Q. And what was your position there?
 4 A. My position there, I worked with the driver
 5 examining division. I was an examiner there for about
 6 a year and a half. Then I was promoted to a
 7 supervisor, then in another year promoted to a higher
 8 level supervisor. From that division I moved into the
 9 driver improvement division where I was a hearings
 10 examiner.

11 Q. Now, approximately what year was that?

12 A. Hearing officer, early '80s. Conducted
 13 hearings pursuant to the implied consent statutes,
 14 habitual traffic offender law, and conducted individual
 15 and group interviews for individuals who had
 16 accumulated too many traffic citations.

17 Q. That was the early '80s, and then what after
 18 that?

19 A. From there I went to work for the budget and
 20 planning division of Department of Licensing and was a
 21 management analyst and planner and then budget analyst,
 22 and from there in 1988 I moved over to the Department
 23 of Ecology.

24 Q. What position did you take when you moved to
 25 DOE?

1 A. Environmental planner position.

2 Q. And where was that?

3 A. That was with the administration program in
 4 the financial services and budget office.

5 Q. Now, when you say administration program in
 6 financial services and budget office, what does that
 7 office do or what did it do?

8 A. Well, the budget office is responsible for in
 9 coordination with the governor's budget office
 10 developing the budget for Department of Ecology, which
 11 is then further scrutinized by the budget office and
 12 the legislature.

13 Q. So is that what you worked on?

14 A. Worked on budget doing cost estimates on
 15 proposed legislation and supported the water quality
 16 program, so worked closely with the water quality
 17 program, its managers, and learning its issues, its
 18 activities, and all the laws and regulations related to
 19 them to assist me in analyzing proposed legislation,
 20 costing it out, and then later to assist them with
 21 budget status reports and budget development work.

22 Q. So this was all focused around budget and
 23 financial issues; is that correct?

24 A. It was focused around budget and water
 25 quality program workload issues, workload planning and

1 budget issues.

2 Q. So workload meaning manpower, person power,
 3 however you want to put it?

4 A. Helping the program budget, for example, for
 5 its permitting functions.

6 Q. What do you mean by helping the program
 7 budget for its permitting functions?

8 A. Working with its managers to develop plans
 9 and then budgets for the resources it would need to
 10 implement a permitting program.

11 Q. So, in other words, figuring out financially
 12 what it would take; is that correct?

13 A. Figuring out staff and dollar resources,
 14 dollars for equipment and all the other resources
 15 needed for a part of the program, for the program and
 16 its various parts.

17 Q. Now, how long were you in this administration
 18 program financial services and budget office?

19 A. I was there for a couple years. Then I moved
 20 over to Department of Fisheries before it was combined
 21 with Department of Game, which it's now Fish and
 22 Wildlife, and I was the budget officer there for a
 23 little less than a year, and then an opening came up
 24 with the water quality program back at Department of
 25 Ecology for a section manager position for its -- the

1 section responsible for legislative review, planning,
 2 information management, personnel matters, so I
 3 competed for that job and took it over in -- boy, it
 4 was '91 or '92.

5 Q. Was this a job that worked out of Lacey or
 6 that worked out of Bellevue?

7 A. It was out of Lacey, and I was a member then
 8 of the water quality program program management team
 9 and worked regularly with the managers responsible for
 10 the permitting programs and regional managers.

11 Q. Now, how long were you in that position as a
 12 section manager in the water quality program
 13 responsible for legislative review planning information
 14 management and personnel?

15 A. That would have been probably only about a
 16 year and a half or two years.

17 Q. Then what job did you move to, if any, after
 18 that?

19 A. Do you mind if we take a break?

20 Q. Not at all.

21 MS. MARCHIORO: You have to answer that
 22 question first.

23 THE WITNESS: I'd like to take a break and
 24 answer the question.

25 MR. EGLICK: He can take a break and answer

1 when he gets back.

2 MS. MARCHIORO: I just want to make sure it
3 was okay.

4 (Recess taken.)

5 (The reporter read back as requested.)

6 A. Well, I went from the section manager of the
7 -- section manager with the water quality program to
8 section manager for the shorelines program at the
9 northwest regional office in Bellevue and managed the
10 shorelines section there for about a year and a half.

11 Q. (BY MR. EGLICK) And that would bring you to
12 about what year?

13 A. I went up there, I believe it was, in '94.
14 After a year to a year and a half, the program merged
15 with water resources program, so it became the
16 shorelines and water resources program, so I became
17 section manager of -- when it was shorelines, the
18 section was 10 or 12 people, I believe, and when we
19 merged with water resources, then I was manager of a
20 section then of about from 25 up to 27 people at one
21 point.

22 Q. And that job was through when?

23 A. That job was through -- some of the dates
24 could be wrong here, the time frames, and I didn't
25 bring my resume, which outlines it a little bit better,

1 but for two or three years section manager for
2 shorelines and water resources. Then there was yet
3 another reorganization.

4 The water resources program was split off
5 from the shorelines program, and then some of the
6 functions of the shorelines program and what was
7 referred to as central programs at headquarters were
8 merged together and regionalized, and that's the time
9 when the -- so I had a choice to go with the water
10 resources program that was peeled away from the
11 shorelines and then what became the shorelines and
12 environmental assistance program.

13 I went with shorelines and environmental
14 assistance. The program shorelines was merged with
15 some of the functions that had been carried out at
16 headquarters, one of them being the 401 coordination
17 work. That function was regionalized at that time. I
18 don't have the exact date for you.

19 Q. What year was that?

20 A. I don't remember.

21 Q. Approximately?

22 A. Let me go back in time here. '97-'98 time
23 frame.

24 Q. Was your next job then as northwest regional
25 director of Department of Ecology?

1 A. That's correct.

2 Q. When did you assume that position?

3 A. That would have been June of '99.

4 Q. Have you ever taken any courses at the
5 university level in hydrology?

6 A. The closest would be a geology course and
7 maybe parts of a physics course.

8 Q. So is that a no?

9 A. No course that was called hydrogeology.

10 Q. Or hydrology?

11 A. Hydrology, no.

12 Q. Neither one?

13 A. No.

14 Q. What about toxicology?

15 A. Nope.

16 Q. Salmon ecology?

17 A. No.

18 Q. Are you a member of the professional
19 association for wetland scientists? Do you know what
20 that's called?

21 A. Sure I do. I have people that I've hired and
22 who work for me that belong to that organization.

23 Q. Are you a member of it?

24 A. No.

25 Q. The Society of Wetland Scientists, is that

1 what it's called?

2 A. I believe.

3 Q. So what course work have you done in the
4 environmental area since getting your MBA?

5 A. Well, there's been some training put on by
6 the shorelines and environmental assistance program
7 technical experts on wetland delineation.

8 Q. Let's talk about that for a minute. You've
9 been to a training on wetland delineation?

10 A. Well, we had -- I'm trying to remember. The
11 program puts on training courses.

12 Q. Right. But my question is have you been to a
13 training on wetland delineation?

14 A. Yes.

15 Q. When?

16 A. That would be a few years ago.

17 Q. How long did the training last?

18 A. Less than a day.

19 Q. What other environmental substantive topics
20 have you successfully completed a training course on?

21 A. I don't remember. None come to mind.

22 Q. When you first got involved with the airport
23 401, what year was it?

24 A. '98. I was aware of airport-related issues
25 in '97, but my involvement -- formal involvement was

1 '98.

2 Q. And what position did you hold at the
3 Department of Ecology at the time?

4 A. Section manager of the shorelines and
5 environmental assistance program.

6 Q. So this was before you became regional
7 director?

8 A. That's correct.

9 Q. And in what capacity did you become involved
10 with the airport application? We're talking about the
11 third runway application, right?

12 A. Uh-huh.

13 Q. Was that a yes?

14 A. Yes.

15 Q. I'm sorry. It's not that I mind an uh-huh.
16 The problem is the court reporter doesn't know what to
17 write down.

18 A. I understand.

19 Q. What capacity did you become involved with
20 the airport application in 1998? What was your role?

21 A. Management lead.

22 Q. What does that mean?

23 A. It means I had responsibility for pulling
24 together the technical experts from the various
25 programs to work together to discuss areas of concerns

1 and issues and attempt to resolve them for purposes of
2 the decision-making process. I would in that role be a
3 contact for external parties too, including the port,
4 and would organize -- help organize meetings and trac
5 progress.

6 Q. Now, have you ever signed a 401 certification
7 for the airport?

8 A. Not for the airport.

9 Q. Now, there have been a few for the airport,
10 haven't there? Just in this third runway business
11 alone, haven't there been three at least?

12 A. The last 401 was signed by Gordon White.

13 Q. You're talking about the September one?

14 A. Right.

15 Q. By the way, why don't we get that out of the
16 way now.

17 MR. EGLICK: Did you folks bring your
18 Exhibits 1 and 2 with you?

19 MR. REAVIS: No. Sorry.

20 MR. EGLICK: That's like a bible. You didn't
21 bring it? I can sell you some extra copies.

22 MS. MARCHIORO: We can share and I'll give
23 them back.

24 MR. EGLICK: Check it and make sure it's the
25 right one. I think this one I'm giving you now is the

1 August 10, which I think is supposed to be Exhibit 1.
2 Am I right? No. August 10 is Exhibit 2. Does
3 everyone agree on that? Anyone disagree?

4 MR. REAVIS: I don't disagree. I will take
5 your word for it.

6 MR. EGLICK: What I'm handing out now is the
7 September 21, which I believe is Exhibit 1.

8 Q. (BY MR. EGLICK) Now, you might want to just
9 check those quickly, Mr. Hellwig, and make sure we're
10 all talking about the same thing. My understanding is
11 that what I've told you is Exhibit 2, the August 10
12 certification, is one of the two that was issued, you
13 know, that have been raised in this case. Does that
14 work for you?

15 A. Yes.

16 Q. Now, both of these were signed, weren't they
17 -- and I guess I better check, but that was my
18 impression they were signed by Gordon White. Is that
19 correct?

20 A. That's correct.

21 Q. So how come you get to do all the work and
22 then he signs?

23 A. In my role as section manager for shorelines
24 and environmental assistance program, I would sign --
25 did sign 401s for various projects, and when it came to

1 the 401 for the runway and associated projects, it wa.
2 decided that given the involvement of multiple programs
3 and headquarters as well as regional staff and given
4 the significance of the decision insomuch as it was --
5 it is a major project proposal, a complicated and
6 complex one, that it would be appropriate for the
7 program manager of the shorelines and environmental
8 assistance program to sign the 401. That's one point.

9 The second point with respect to my role,
10 after becoming a regional director, regional directors
11 -- it is not the role of regional directors typically
12 to sign permit or certification documents. It is the
13 role of the program manager or the section heads in the
14 regions to sign permits or certification documents.

15 Q. Say that --

16 MR. EGLICK: Could you read back the last
17 sentence, please?

18 (The reporter read back as requested.)

19 Q. (BY MR. EGLICK) I think you said it's the
20 role of the program managers or section heads in the
21 regions to sign certification documents?

22 A. Yes.

23 Q. So in this case, who would the program
24 manager be who would have normally signed the Sea-Ta.
25 401 certifications?

37

1 A. The program manager is Gordon White.

2 Q. And he as the program manager is based at
3 headquarters; is that correct?

4 A. That's correct.

5 Q. And then the section head in the region, who
6 would that be?

7 A. There's four regions, and in the northwest
8 region, the section head -- I was the section head up
9 until '99 and had been signing 401 certifications for
10 other projects up to that point, and following me into
11 that position is Jeannie Summerhays. She's the current
12 section manager for shorelines and environmental
13 assistance program. She reports, as I did when I was
14 in that position, to Gordon White, who is the program
15 manager.

16 Q. But because of the significance of this
17 project, the signature authority was given to Gordon
18 White; is that correct?

19 A. I think I said that because of the
20 involvement of multiple programs, the complexity --
21 that it was a major project proposal, a complicated and
22 complex one, and I think in part too because of the
23 transition from me into my new job, although I'm not
24 recollecting specifically, it was decided that the
25 program manager would sign this 401. There could be

1 other reasons. I expect there are, but I don't
2 remember them.

3 (Mr. Stock joined the proceedings.)

4 Q. Who made the decision as to who would sign?

5 A. I believe that Gordon White made that
6 decision.

7 Q. So that was a decision that he could make
8 authoritywise?

9 A. Yes.

10 Q. Gordon White is based -- I think we already
11 said this. I want to be sure. He's based in Olympia?

12 A. Actually, Lacey. Our office building is in
13 Lacey.

14 Q. Tell me if I'm wrong about this, but in all
15 these facilitated meetings and all this that took
16 place, which we're going to talk about later, did
17 Gordon White come to any of those meetings that you
18 recall?

19 A. I don't recall that he did, no. I don't
20 believe he did.

21 Q. Let's go back to something we were talking
22 about earlier. I just want to make sure that I have
23 covered this, because we may have moved away from it.
24 When you were talking about preparing for your
25 deposition, I believe I asked you whether you talked

39

40

1 with anyone affiliated with the port about your
2 deposition or anything related to it. What's the
3 answer to that?

4 A. No.

5 Q. You said that you had talked and you gave me
6 a list of people you had talked with. Did you have any
7 contact other than conversation in preparation for your
8 deposition; for example, an e-mail?

9 A. No.

10 Q. Did you attend the department --

11 A. Well, pardon me. There were e-mails, of
12 course, logistical e-mails that referred to the
13 depositions, of course, for purposes of scheduling,
14 setting them up.

15 Q. Did you attend the Department of Ecology
16 training session on depositions which was held to
17 prepare people for this deposition?

18 A. Yes.

19 Q. You did. Okay. That slipped your mind?

20 A. I had forgotten that Joan had come out to the
21 -- our attorney had come out to the office and met with
22 folks who were scheduled for depositions.

23 Q. And when was that?

24 A. That was before Christmas as well. I don't
25 have the exact date.

1 Q. Was that before or after you met with the
2 director about your deposition?

3 A. I believe the brief conversation I had with
4 the director happened before the meeting at the
5 Bellevue office.

6 Q. And the meeting at the Bellevue office you're
7 referring to the training session that Joan Marchioro
8 held?

9 A. The overview, the training session that we
10 had with our attorney.

11 Q. Did anyone other than Department of Ecology
12 personnel attend that session?

13 A. No.

14 Q. You're aware, are you not, Mr. Hellwig, that
15 the board has issued a stay of the 401 certification in
16 this case?

17 A. Yes.

18 Q. When did you become aware of that?

19 A. I don't remember the exact date, but it would
20 have been as soon as our attorneys found out and
21 notified us.

22 Q. And are you aware that the board has issued a
23 partial summary judgment on the appeal brought by case
24 on the MPDS permit major modification?

25 A. No. That's not the way I understand the

1 situation.
 2 Q. What's your understanding?
 3 A. My understanding is that ecology prevailed on
 4 three or four of the issues that were under debate.
 5 Q. And what's your understanding of what
 6 happened on the issue or issues that ecology did not
 7 prevail on?
 8 A. I don't have a clear understanding.
 9 Q. Have you reviewed the decision --
 10 A. No.
 11 Q. -- on the MPDS major modification?
 12 A. No.
 13 Q. Have you reviewed the board's decision on the
 14 stay of the 401 certification?
 15 A. I looked through it.
 16 Q. And when did you do that?
 17 A. I don't have the exact date, but it would
 18 have been shortly after the document was delivered to
 19 the Bellevue office.
 20 Q. Before or after Christmas?
 21 A. That was before Christmas. Wait. I could be
 22 confusing -- I could be confusing documents here. The
 23 appeal document and the -- would you repeat the
 24 question?
 25 MR. EGLICK: Could you read the question

1 back, please?
 2 (The reporter read back as requested.)
 3 A. I think I confused that document with an
 4 earlier appeal-related document, but I did look throu
 5 the stay document. I don't remember the exact time.
 6 Q. (BY MR. EGLICK) What earlier appeal document
 7 did you confuse your review of the PCHB stay decision
 8 with?
 9 A. I don't remember specifically.
 10 Q. Were you aware before it was filed that the
 11 port was going to appeal the PCHB stay decision?
 12 A. I was aware it was being considered.
 13 Q. And how were you aware of that?
 14 A. I believe I was aware of that through our
 15 attorneys.
 16 Q. You mean -- when you say our attorneys, you
 17 mean the attorneys for the port?
 18 A. When I say our attorneys, I mean the
 19 assistant attorney generals that support Department of
 20 Ecology.
 21 Q. How would the assistant attorney general for
 22 the Department of Ecology know what the port was going
 23 to do?
 24 A. I don't know.
 25 Q. You have no idea?

1 A. I have no recollection.
 2 Q. Well, this is all events that have occurred
 3 in the past month; is that correct?
 4 A. That's correct.
 5 Q. But you have no recollection?
 6 A. I don't remember specifically.
 7 Q. Did you ever talk to anyone in ecology about
 8 the port possibly appealing the PCHB stay decision?
 9 A. I don't remember.
 10 Q. Can't recall at all?
 11 A. I don't remember a specific instance of doing
 12 that.
 13 Q. Did you ever talk to anyone affiliated in any
 14 way with the Port of Seattle about the possibility that
 15 it would appeal the PCHB stay decision?
 16 A. I don't remember that, no.
 17 Q. You don't remember either way or you don't
 18 remember doing that?
 19 A. I don't remember having -- no, I did not.
 20 Q. Have you had any meetings with persons
 21 affiliated with the port since December 15, 2001?
 22 A. No.
 23 Q. Have you had any contact with persons
 24 affiliated with the port since December 15, 2001?
 25 A. I believe I've had one or two -- I don't

1 remember the specific number. I've had conversations
 2 with Robin Kordik and Elizabeth Leavitt.
 3 Q. Now, who is Robin Kordik?
 4 A. Robin Kordik works for the port, is assisting
 5 with an interlocal agreement that is being developed
 6 between ecology and the port that would make resources
 7 available to ecology to assist in overseeing compliance
 8 with the terms and conditions of the 401 certification
 9 for the runway and associated projects.
 10 Q. What's Ms. Kordik's position with the port if
 11 you know?
 12 A. I don't know the title.
 13 Q. Do you know what her area of responsibility
 14 is?
 15 A. Well, the area of responsibility includes
 16 support relating to the runway work and that project.
 17 Q. When was the conversation -- was it one
 18 conversation with Ms. Kordik?
 19 A. No. I've had a few conversations with her
 20 about the interlocal agreement that we are attempting
 21 to develop between our agencies.
 22 Q. And this is a few conversations since
 23 December 15, 2001; is that correct?
 24 A. The conversations I'm thinking of may have
 25 happened some of them before that date, some of them

1 after, but in the neighborhood of early December, late
2 November, early December.

3 Q. Now, you also mentioned that you'd had
4 conversations with Elizabeth Leavitt since December 15,
5 2001; is that correct?

6 A. I believe that I have.

7 Q. Elizabeth Leavitt is the person sitting right
8 here in the room across the table?

9 A. That's correct.

10 Q. And what's her position?

11 A. She's manager of the Port of Seattle or
12 director of the Port of Seattle aviation environmental
13 division. That's not an exact title.

14 Q. And what has been the substance -- well,
15 let's back up a minute. How many conversations have
16 you had since December 15, 2001, with Elizabeth
17 Leavitt?

18 A. I don't remember the exact number.

19 Q. Less than five?

20 A. Yes.

21 Q. And who's initiated them?

22 A. I believe that -- I'm not remembering who
23 initiated each conversation, but my best recollection
24 is that I may have initiated at least one of them and I
25 believe she initiated at least one of them.

1 just don't recall?

2 A. I don't recall that there was a reference to
3 the PCHB stay.

4 Q. Now, you say the other conversations since
5 December 15, 2001, with the port have been initiated by
6 did you say Ms. Leavitt?

7 A. I don't remember a specific contact, but I
8 seem to recall that on my voice mail when Ms. Leavitt
9 returned from vacation she left a message just checking
10 in wanting to touch base with me on things.

11 Q. And did you return the call?

12 A. Yes.

13 Q. And what did you discuss?

14 A. I believe that all the conversations dealt
15 with essentially the same matters, the interlocal
16 agreement and status of submittals.

17 Q. When you say status of submittals, does
18 status include the substance of the submittals in any
19 way?

20 A. No.

21 Q. What actions to your knowledge has ecology
22 taken in response to the PCHB stay order?

23 A. I have a status or voice message from our
24 assistant attorney general relating to that.

25 MR. EGLICK: Could you read back the

1 Q. What was the purpose of the call that you
2 initiated?

3 A. My best recollection is that it involved
4 touching base on the interlocal agreement, the status
5 of that.

6 Q. Any other topics discussed in the
7 conversation?

8 A. There may have been reference in the
9 conversation to submittals due to ecology from the port
10 pursuant to the 401.

11 Q. And what was the nature of the reference to
12 those submittals?

13 A. I believe that there was a reference to the
14 timing or the status of the submittal of an updated low
15 flow technical analysis document.

16 Q. And what was discussed with regard to the
17 timing or status of that document?

18 A. Nothing beyond the timing or status.

19 Q. What was said about the timing or status of
20 that document?

21 A. I don't remember the specific conversation.

22 Q. Was any reference made to the PCHB stay
23 order?

24 A. I don't remember that.

25 Q. Does that mean there was no reference or you

1 question, please?

2 (The reporter read back as requested.)

3 Q. (BY MR. EGLICK) Could you answer that
4 question, please?

5 A. My understanding is that we filed a document
6 -- that the attorneys on behalf of the agency have
7 filed a document. I'm not familiar with the substance
8 of that document. I haven't seen it and don't know the
9 details of it.

10 Q. What do you know about it?

11 A. We're supporting the port's appeal of the
12 stay. I don't know the specifics around what support
13 constitutes.

14 Q. When was the decision made to support the
15 port's appeal of the stay by ecology?

16 A. Voice messages were exchanged between myself
17 and the assistant attorney general's office, myself and
18 the director, and my guess would be there were other
19 messages exchanged, but I don't have knowledge of them.

20 Q. What was the substance of the voice messages
21 that you're aware of? Take them one at a time and go
22 through them.

23 A. The substance dealt with whether or not
24 ecology should support the port's stay of the decision
25 -- whether or not ecology should support the port's

1 appeal of the stay and what form that support should
2 take and the level of -- the idea that the level of
3 effort associated with that support could be variable.

4 Q. Now, you say there was one voice message
5 exchanged between yourself and the assistant attorney
6 general; is that correct?

7 A. There may have been more than one. I don't
8 remember.

9 Q. And there was one or more voice messages
10 exchanged between you and the director on this topic?

11 A. I don't believe that the director -- wait. I
12 believe there were two messages traded back and forth.
13 I believe the director only responded to one of my
14 messages. The gist of the messages was to coordinate
15 on the type of or level of support that we would be
16 connecting to the port's appeal of the stay.

17 Q. Now, is it your testimony, then, that ecology
18 has already made a decision to support the PCHB's --
19 excuse me -- to support the port's appeal of the PCHB
20 stay decision?

21 A. It's my understanding that we've done that.

22 Q. And do you know when that decision occurred?

23 A. Well, the decision leading up to the action
24 evolved over a period of several days as I understand
25 it.

1 Q. Well, why don't you start at the beginning
2 and tell me how it evolved. Give me dates and times
3 and people's names.

4 A. I don't remember specific dates and times,
5 but the names -- it would be the names of our
6 attorneys, Tom Young and Joan Marchioro, and the
7 messages, I believe one from Tom Young, would have gone
8 to Tom Fitzsimmons and I, and I recall responding back
9 to Tom Young and to Tom Fitzsimmons --

10 Q. When was this?

11 A. In a voice message.

12 Q. But when was it?

13 A. A few days back.

14 Q. A few days back from today, you mean?

15 A. Yes.

16 Q. So today is January 8, so what's a few days
17 back?

18 A. I don't remember the exact date. I've worked
19 several days straight now, and it's literally mixed up
20 in my mind.

21 Q. Was it January 1?

22 A. No.

23 Q. Was it January 2?

24 A. May have been.

25 Q. Could it have been as late as January 3?

1 A. I don't remember.

2 Q. Could it have been as late as yesterday?

3 A. It was before yesterday.

4 Q. Yesterday was Monday; is that right?

5 A. It would have been last week.

6 Q. So last week, Thursday or Friday of last
7 week?

8 A. Possibly.

9 Q. Which would be the 3rd or the 4th, is that
10 correct, of January?

11 A. I think so, yes.

12 Q. So we know it's between January 2 and January
13 4; is that correct?

14 A. That's my best recollection.

15 Q. Now, were all the interchange on this
16 conducted by voice mail and telephone?

17 A. Voice messaging, yes.

18 Q. Any electronic or documentary media employed?

19 A. There may have been -- I believe there was
20 one attorney/client privilege message from Tom Young
21 just --

22 MS. MARCHIORO: I'm going to object to the
23 extent you're asking about the substance of that if
24 we're getting --

25 MR. EGLICK: Are you objecting to the

1 question I just asked or the one I haven't asked yet:
2 Why don't we read back the question and see if you want
3 to object.

4 (The reporter read back as requested.)

5 MS. MARCHIORO: I'm sorry. I misunderstood
6 the question.

7 MR. EGLICK: Could you read back the answer,
8 please?

9 (The reporter read back as requested.)

10 MS. MARCHIORO: I misunderstood your
11 question.

12 Q. (BY MR. EGLICK) To your knowledge, was there
13 a request from the port in any way that DOE join and
14 support -- join in support of its appeal of the PCHB
15 stay?

16 A. No. Not that I'm aware of.

17 Q. You said you were aware of one what you're
18 terming an attorney/client privilege message from Tom
19 Young. Did that message include any information
20 obtained from the port?

21 A. My best recollection is it was just an
22 indication of legal actions occurring.

23 Q. And your reference to a message came in the
24 response to my question as to whether there were any
25 documentary or electronic media that were used in the

1 communications concerning the DOE decision to join or
2 support the port's appeal of the PCHB stay decision.
3 You mentioned this one document. Are there any others,
4 documents, electronic media, or anything of that sort?

5 A. Not that I'm recalling.

6 Q. Did you send any messages yourself other than
7 by telephone or voice mail or make any communications
8 other than by telephone or voice mail?

9 A. No.

10 Q. Have you reviewed the document that you say
11 has been filed concerning DOE's support?

12 A. No.

13 Q. Have you seen it?

14 A. No.

15 Q. Do you know who made the decision for ecology
16 to support the port's appeal of the stay?

17 A. I'm only aware of the conversations or the
18 messages, rather, traded back and forth between myself
19 and the attorneys and a couple of messages I recall
20 sending or copying the director on, Tom Fitzsimmons,
21 and one response I got back from him, and as far as a
22 final decision, I'm not aware of a final decision
23 point. I am aware that Mr. Fitzsimmons and I were in
24 agreement on supporting the appeal of the stay, but we
25 did not have a conversation about what form that

1 support should take.

2 Q. Supporting the stay?

3 A. My understanding is there's -- we had more
4 than one alternative in front of us with respect to how
5 we would join in or support the port's appeal of the
6 stay, and so I was not involved with real time
7 conversations with our attorneys or Mr. Fitzsimmons on
8 what form that support should take.

9 MR. EGLICK: Maybe I can ask Ms. Marchioro
10 this. He's testifying that something's been filed.
11 Now, I can testify for the record here that if
12 something's been filed, we haven't received it. Do you
13 have a copy with you today, Ms. Marchioro, that we
14 might refer to?

15 MS. MARCHIORO: No.

16 MR. EGLICK: Could you maybe have one over
17 the lunch break faxed by your office so that we could
18 ask Mr. Hellwig some questions about it?

19 MS. MARCHIORO: Possibly.

20 MR. EGLICK: Maybe you could check in the
21 next break and let us know before the lunch break,
22 because I think we may want to ask him some questions,
23 and, of course, we won't know that. If it's been
24 filed, I assume that you would agree we're entitled to
25 have it when it's filed.

1 MS. MARCHIORO: I didn't say you weren't
2 entitled to have it.

3 MR. EGLICK: Do you agree we're entitled to
4 have it when it's filed?

5 MS. MARCHIORO: I didn't say you weren't
6 entitled to have it. It's in the mail.

7 MR. EGLICK: Do you know when it was mailed?

8 MS. MARCHIORO: Yesterday afternoon.

9 MR. EGLICK: In other words, it was filed
10 with the court or was it mailed to the court?

11 MS. MARCHIORO: It was filed to the court.

12 MR. EGLICK: And then mailed to us from
13 Olympia?

14 MS. MARCHIORO: Yes. If you don't have it in
15 your mail, I'll be happy to give my office a call.

16 MR. EGLICK: I think Mr. Stock will go check,
17 but as far as I know, we don't have it.

18 (Mr. Stock left the room.)

19 Q. (BY MR. EGLICK) Is ecology taking any other
20 action, then, in the port court proceeding? What
21 you're telling me, Mr. Hellwig, is that ecology is
22 going to join in the port appeal of the stay, so we
23 know about that, but is ecology taking any other action
24 in response to the stay that you're aware of?

25 A. No. I'm not aware of any other.

1 Q. Is ecology considering taking any other
2 action in response to the stay?

3 A. Not that I'm aware of.

4 Q. Has ecology considered taking any other
5 action in connection with or in any way in response to
6 the stay?

7 A. Not that I'm aware of.

8 Q. Has ecology considered not proceeding with
9 implementation of the 401 in response to the stay?

10 A. I believe that we're in need of having some
11 conversations about that issue.

12 Q. Didn't you just tell me a few minutes ago
13 that you were having conversations with the port
14 concerning various matters that really are
15 implementation of various aspects of the 401
16 certification, aren't you?

17 A. I referred to conversations that we had about
18 the interlocal agreement, yes.

19 Q. And that is part of implementation of the 401
20 conditions, isn't it?

21 A. Yes.

22 Q. And is ecology continuing to move ahead on
23 401 implementation despite the stay?

24 A. Ecology is in a position where I think we
25 need to have additional conversations about the

1 applicability of the action to what our work should be.
 2 MR. EGLICK: Could you read back the
 3 question, please?
 4 (The reporter read back as requested.)
 5 Q. (BY MR. EGLICK) Could you answer that
 6 question, please?
 7 A. It's not clear to me that any work we're
 8 doing now related to the 401 would be considered
 9 implementation or not. In the last two or three days
 10 or in the last week, I have done no work on the
 11 interlocal agreement, and I'm not aware of any other
 12 work that staff might be doing related to the 401.
 13 Q. Has ecology made a decision not to proceed
 14 with implementation of the stay in response to the PC
 15 -- with implementation of the 401 in response to the
 16 PCHB decision?
 17 A. Please ask that again.
 18 Q. I'll ask another question. Has ecology made
 19 a decision not to proceed with implementation of the
 20 401 in response to the PCHB stay decision?
 21 A. We have not made a specific decision one way
 22 or another.
 23 Q. So is there any impediment that you know of
 24 to ecology proceeding with implementation of the 401?
 25 A. It's a matter that I need to discuss with our

1 attorneys and with staff.
 2 Q. When did the stay decision come out,
 3 Mr. Hellwig?
 4 A. I don't recall the exact date.
 5 Q. It was mid December; is that correct?
 6 A. If that's the date.
 7 Q. It's now January 8. Can we agree on that?
 8 A. Yes, we can.
 9 Q. So has a meeting been scheduled where ecology
 10 will decide whether or not it will proceed with
 11 implementation of the 401 in light of the stay?
 12 A. No.
 13 Q. You would know about it, wouldn't you, if
 14 such a meeting had been scheduled?
 15 A. Most likely.
 16 Q. In fact, you would be the person most likely
 17 to schedule it, wouldn't you?
 18 A. Most likely, yes.
 19 Q. And have you or to your knowledge anyone in
 20 ecology advised the port that implementation of the 401
 21 will not proceed in light of the stay?
 22 A. I'm not aware of that.
 23 Q. Has ecology been considering at any time
 24 since issuance of the -- what's the date on the latest
 25 401? Is that September 21, Exhibit 1? Do we agree on

1 that?
 2 A. September 21.
 3 Q. Has ecology been considering since September
 4 21 at any time to your knowledge amendments to its 401
 5 certification? By amendments I mean changes,
 6 modifications, clarifications, whatever rubric is
 7 placed on a change.
 8 A. Not that I'm aware of.
 9 Q. Have there been any discussion about changes
 10 to the 401 in light of the PCHB decision granting a
 11 stay?
 12 A. I believe that we need to have more
 13 conversation about that within the agency.
 14 MR. EGLICK: Could you read back the
 15 question, please?
 16 (The reporter read back as requested.)
 17 Q. (BY MR. EGLICK) Could you please answer that
 18 question?
 19 A. I'm not aware of any changes being considered
 20 to the 401 in light of that stay decision.
 21 Q. Are you aware of any changes being considered
 22 to the 401 in light of anything else?
 23 A. The port will be submitting additional
 24 information to ecology pursuant to the 401, and ecology
 25 will review that information. I'm not exactly sure

1 what's in front of us right now, but I'm not aware of
 2 any specific changes that are being considered at this
 3 time.
 4 Q. Well, will the -- how do you know that the
 5 port will be submitting additional information?
 6 A. My understanding without looking at the
 7 document or talking to staff in the last couple of days
 8 is that the port would be, I believe has, submitted
 9 additional technical information -- part of this is
 10 coming back to me. The port has submitted additional
 11 technical information related to low flow that ecology
 12 will have its consultant experts at King County review
 13 pursuant to a contract we have with the county.
 14 Q. And when was this additional information
 15 submitted?
 16 A. I don't have the exact time.
 17 Q. Was it in 2002?
 18 A. I don't know.
 19 Q. Is there any suggestion in any way that
 20 you're aware of that the port will change its proposal
 21 as a result of this submission of additional
 22 information?
 23 A. Not that I'm aware of.
 24 Q. Any suggestion for a change in the -- or any
 25 possibility based on this additional information --

1 let's ask it that way -- any possibility based on this
2 additional information of a change in the 401
3 certification?

4 A. Well, depending on how the legal process
5 sorts itself out, I would suppose it's fair to say that
6 there's a possibility, yes.

7 Q. Other than based on how the legal process
8 sorts it out, the legal process might not happen at
9 least tomorrow. Any other possibility?

10 A. I'm not sure I understand the question
11 anymore.

12 Q. Ecology doesn't have to wait for the legal
13 process to sort itself out, does it, to try to make a
14 change in the 401?

15 A. It's not clear to me right now the way -- how
16 the pending stay and the related appeals affect what
17 ecology should or should not be considering with
18 respect to a change to the 401, and I need to consult
19 with our attorneys and our staff on that.

20 Q. Well, is ecology considering making a change
21 to the 401?

22 A. Not that I'm aware of.

23 Q. Has the port asked for a change to the 401 in
24 any way?

25 A. Not that I'm aware of.

1 Q. Have you talked with anyone affiliated with
2 the Army Corps of Engineers concerning the PCHB stay?

3 A. No.

4 Q. Do you know whether anyone else in ecology
5 has?

6 A. No.

7 Q. Didn't you at one time ask one of your staff
8 persons to determine what would be the effect on the
9 corps 404 decision-making process if a stay were
10 granted by the PCHB?

11 A. I believe I may have asked that question, but
12 I'm not remembering who I asked, if it was an attorney
13 or a staff.

14 Q. Why would you ask that?

15 A. Trying to understand the overall
16 decision-making processes for ecology and the corps and
17 how they fit together.

18 Q. Does ecology have an interest in whether or
19 not the corps does or does not issue a 404 permit under
20 the Clean Water Act for the port's project?

21 A. My general understanding is that the corps
22 would not be able to issue a 404 if the 401 is stayed
23 or not approved, and I believe I was asking for
24 information around to either confirm that or to help me
25 understand better what the corps processes were with

1 respect to the state process.

2 MR. EGLICK: Could you read back the
3 question, please?

4 (The reporter read back as requested.)

5 A. What do you mean do we have an interest?

6 Q. (BY MR. EGLICK) Does ecology have a position
7 either way on whether the army corps should issue a
8 Clean Water Act section 404 permit approval for the
9 port's project?

10 A. Well, we think we made a good decision, and
11 we think that we'll prevail, and based on that, we have
12 an interest in the corps accepting our decision. The
13 corps, its business is its own, but inasmuch as it can
14 make a decision only after we've made our decision as I
15 understand it, then we have an interest in how it fits
16 together.

17 Q. And the interest is as I understand it in
18 having the army corps issue a 404 permit based on
19 ecology's 401 decision?

20 A. My understanding is that's part of the base
21 of their decision, but if they issue the 404, in part
22 our interest then in the project moving forward is
23 being able to monitor what happens and ensure the
24 port's compliance with the terms and conditions of the
25 401.

1 Q. Does ecology have an interest in having the
2 port's project move forward?

3 A. Ecology has an interest in defending its
4 decision, but ecology is not a project proponent.

5 Q. So is the answer to my question, then, that
6 ecology does not have an interest in whether the port's
7 project moves forward?

8 A. I'm not sure I understand the question with
9 respect to interest in the port's project moving
10 forward. We have an interest in making a solid
11 decision that ensures that the project conforms with
12 pertinent environmental laws and regulations and that
13 the environment is protected.

14 Q. Does ecology have a position on whether or
15 not the port's project should move forward?

16 A. Ecology's position is that what the port
17 submitted ultimately gave us reasonable assurance that
18 water quality would be protected and therefore that the
19 certification should be granted.

20 Q. That's the certification, but my question is
21 -- and she'll read it back if you like, but I believe
22 my question is whether ecology has a position of
23 whether the port's project should move forward.

24 A. And I apologize if I'm not understanding the
25 question clearly, but our interest is in making a

1 sound, defensible decision.
 2 Q. Let me ask it this way. Is it your
 3 testimony, then, that once ecology issued the 401
 4 certification, it became a proponent for implementation
 5 of the port's project as a whole?
 6 A. We're not a proponent for implementation. We
 7 have responsibility for overseeing the implementation.
 8 It's not our responsibility to implement the project.
 9 Our responsibility is to oversee and ensure it conforms
 10 with the terms and conditions of the 401.
 11 Q. So ecology, then, does not have a position
 12 that says we are in favor of the port project
 13 proceeding; is that correct?
 14 A. Not that I'm aware of.
 15 Q. And the 401 certification in your view does
 16 not commit ecology to advocate for the port project
 17 moving ahead; is that correct?
 18 A. That's my understanding at this point.
 19 Q. And, in fact, other than perhaps some
 20 professional pride, if the PCHB happened to disagree
 21 with the 401 certification, that would not contravene
 22 any particular policy position that ecology has with
 23 respect to the third runway, would it?
 24 A. Ask that again, please.
 25 MR. EGLICK: Could you read it back, please?

1 (The reporter read back as requested.)
 2 A. I'm not sure what you mean by professional
 3 pride, and I'm not sure I understand the question.
 4 Q. (BY MR. EGLICK) Would you like me to explain
 5 it?
 6 A. Would you, please?
 7 Q. Professional pride, I'm assuming that you and
 8 the folks you work with have some pride in your work;
 9 is that correct?
 10 A. Yeah. We think we do good work.
 11 Q. So professional pride means at least as I
 12 expressed it that if you issue a decision you hope that
 13 it's upheld because you worked on it.
 14 A. Certainly.
 15 Q. So we're clear on that part of the question
 16 now?
 17 A. Yes.
 18 Q. Was there another part that you --
 19 A. The rest of it.
 20 Q. The rest of the question -- and I'll have it
 21 read back in a minute -- was asking whether or not
 22 other than obviously taking pride in your work and
 23 being invested in your work for that reason, other than
 24 that, did ecology have a position in favor of the third
 25 runway that would be contravened by a PCHB decision

1 that reversed the 401 certification?
 2 A. Not that I'm aware of.
 3 Q. So other than professional pride, ecology
 4 doesn't care whether the 401 is upheld, correct?
 5 A. I'm reflecting upon your definition of
 6 professional pride. Other than the fact that we think
 7 that we made a solid, defensible decision, no, we don't
 8 have an opinion on the project. We're not a proponent.
 9 Q. And there's no public interest that ecology
 10 is responsible for administering, is there, that says
 11 there should be a third runway?
 12 A. That's not our role.
 13 Q. So what's the answer to my question?
 14 A. No.
 15 MR. EGLICK: What's your pleasure, folks? We
 16 can take a slightly early lunch break or I can go on to
 17 another line of questioning which will probably take me
 18 maybe 15 minutes. Off the record.
 19 (Discussion off the record.)
 20 (Recess taken.)
 21 Q. (BY MR. EGLICK) Did you just talk with
 22 Mr. Reavis?
 23 A. Briefly.
 24 Q. What did you talk about?
 25 A. I believe he asked me if this was similar to

1 previous depositions. I said it feels about the same,
 2 although I don't recall a lot of specifics from the
 3 previous depositions, and then was informed that he's
 4 been on the other side before and had a deposition
 5 himself. That was about it.
 6 Q. On the other side of what?
 7 A. The table. After conducting several of them
 8 has been on the other side.
 9 Q. Really?
 10 A. Uh-huh.
 11 Q. Do you know anyone who works at the
 12 California Coastal Commission?
 13 A. I do.
 14 Q. And who would that be?
 15 A. Jamie Kooser.
 16 Q. How do you spell that?
 17 A. K-o-o-s-e-r.
 18 Q. And what's the first name, J-a --
 19 A. Jamie. J-a-m-i-e, I believe is how she
 20 spells it.
 21 Q. Have you ever spoken to that person about Tom
 22 Luster?
 23 A. Boy, not that I recall. It's possible in
 24 briefly four or five years ago, but I don't recall
 25 specifically. We were part of the same program, worked

1 together.
 2 Q. Do you recall telling someone at the army
 3 corps hearing that you spoke regularly with a person at
 4 the California Coastal Commission who was Tom Luster's
 5 supervisor?
 6 A. No.
 7 Q. Do you speak with someone regularly at the
 8 California Coastal Commission?
 9 A. I haven't talked with Jamie Kooser in a
 10 couple of years or more.
 11 Q. Have you talked with anyone else at the
 12 California Coastal Commission in the last two years?
 13 A. No.
 14 Q. And have you contacted in any way the
 15 California Coastal Commission with anything with regard
 16 to Tom Luster?
 17 A. No.
 18 Q. Have you had any discussions at the
 19 Department of Ecology concerning ACC expert witnesses
 20 or commentators and how they would be treated on
 21 projects they're involved in other than the third
 22 runway?
 23 A. Not that I recall.
 24 Q. Well, you took a minute for that one,
 25 Mr. Hellwig. I want to make sure. Is there something

1 that you think you might recall but don't or do?
 2 A. I was trying to recall after you asked the
 3 question who some of the experts were who support ACC.
 4 Q. Well, would you like me to give you the names
 5 of the experts who have submitted comments that ACC has
 6 sponsored?
 7 A. Sure.
 8 Q. Amanda Azuse, wetlands, does that ring a
 9 bell? You've met her, haven't you?
 10 A. Sure I have.
 11 Q. Any discussion at ecology that you're aware
 12 of in any way, shape, or form about how she would be
 13 treated?
 14 A. How she would be treated with respect to
 15 what?
 16 Q. Her activities on behalf of clients other
 17 than ACC.
 18 A. No.
 19 Q. What about Northwest Hydraulic Consultants?
 20 A. The names of the individuals?
 21 Q. Bill Rozeboom and Dr. Malcolm Leytham.
 22 A. No.
 23 Q. Not aware of any discussions or any
 24 conversation or e-mail having to do with treatment of
 25 ACC experts in other arenas other than the third

1 runway?
 2 A. I'm not recalling that, no.
 3 Q. You're not recalling them or you don't know?
 4 A. Well, we've talked about those consultants
 5 before. We've had conversations about the ACC's
 6 consultants generally.
 7 Q. Who is we?
 8 A. Staff.
 9 Q. Who is staff?
 10 A. Ching-Pi Wang and I believe Dave Garland and
 11 Ann Kenny.
 12 Q. And when was the last such conversation?
 13 A. Don't remember.
 14 Q. Was it in 2002?
 15 A. No.
 16 Q. Was it in 2001?
 17 A. Possibly.
 18 Q. Did you keep any notes of these
 19 conversations?
 20 A. Not that I recall.
 21 Q. Any e-mails?
 22 A. Not that I recall.
 23 Q. Have you ever been on the Sea-Tac site?
 24 A. Yes.
 25 Q. More than once?

1 A. Yes.
 2 Q. How many times?
 3 A. When you say Sea-Tac site, are you talking
 4 about office facilities, the area where the runway --
 5 proposed runway would be built? What do you mean?
 6 Q. Project area, not existing office facilities.
 7 A. I've been to the project area two or three
 8 times.
 9 Q. And over the course of what period of time?
 10 A. Two or three years.
 11 Q. And how have you happened to be there? Did
 12 you just lose your way getting ready to take a flight?
 13 A. On trips with technical experts from the
 14 operating programs on whom I rely substantially and
 15 trust in their judgment. Eric Stockdale and Kevin
 16 Fitzpatrick may have been at one, and I believe --
 17 well, I don't know if Tom Luster was at one or not
 18 earlier as the 401 coordinator. He may have been.
 19 The primary purpose, though, was to see the
 20 site, see where the embankment would be built, and get
 21 an understanding of where some of the environmental
 22 impacts would occur to assist in understanding
 23 mitigation requirements.
 24 Q. Now, I made a joke there, how did you happen
 25 to be there, did you miss a flight, and I think you

1 launched right into why you were there, so I assume
 2 this was something that you arranged with the port?
 3 A. Yes.
 4 Q. And did they put a lot of restrictions on
 5 your access to the site or did they let you see what
 6 you wanted to see?
 7 A. We saw what we wanted to see.
 8 Q. Went where you wanted to go to assess these
 9 things you just described to me; is that right?
 10 A. Yes.
 11 Q. And did you have to sign a lot of paperwork
 12 to do this?
 13 A. No.
 14 Q. And how long on average did these site visits
 15 last?
 16 A. A couple hours.
 17 Q. Each?
 18 A. Approximately.
 19 Q. Was some of this by vehicle and some walking?
 20 A. Yes.
 21 Q. Anyone with a camera?
 22 A. I don't remember.
 23 Q. Do you recall anybody telling you you can't
 24 bring a camera?
 25 A. No.

1 Q. And did you take notes?
 2 A. I don't remember taking notes.
 3 Q. Now, I think when I asked you about the site
 4 visits to start with you were describing things that
 5 you wanted to see, and you said something about assist
 6 in understanding. That was a phrase you used. Do you
 7 recall that?
 8 A. Yes.
 9 Q. So why does the site visit assist you in
 10 understanding?
 11 A. In working with the technical experts in the
 12 program, the 401 coordinator works closely with the
 13 technical experts, should work with them, and knowing
 14 that I would be having conversations with the technical
 15 people and the 401 coordinator, having seen the site, I
 16 knew it would add context to or around my understanding
 17 of mitigation requirements, what type of wetland was
 18 being impacted, for example, what Miller Creek looked
 19 like, how the residences backed up to Miller Creek.
 20 Q. So as far as you were concerned, that was
 21 something that you thought would be useful to your
 22 understanding of the project and the request for
 23 certification; is that correct?
 24 A. Yes.
 25 Q. When was the last time you were on the site?

1 A. It's been many months since I've been on the
 2 project site, I believe. I'm not recalling -- let me
 3 think. Well, we had -- sometime in 2001 I believe I
 4 was on the project site. I'm not remembering the exact
 5 date. It was from a -- that trip, I believe, was all
 6 in a vehicle.
 7 Q. And previous trips were multimodal as we
 8 said?
 9 A. In the vehicle and then walking onto
 10 properties to look at aquatic resources.
 11 Q. Aquatic resources. For someone who reads
 12 this who isn't a member of our little club here, you're
 13 talking about streams and wetlands and that sort of
 14 thing?
 15 A. Wetlands, streams, related habitat.
 16 Q. Looking at the September 21 certification,
 17 did ecology notify the Environmental Protection Agency
 18 before it issued the modified certification?
 19 A. I don't recall that.
 20 Q. So did ecology get approval from the
 21 Environmental Protection Agency for the modifications
 22 in the September 21 certification?
 23 A. Not that I'm aware of.
 24 Q. So to your knowledge, has ecology ever
 25 notified EPA that the original August certification was

1 modified?
 2 A. Please repeat that question.
 3 MR. EGLICK: Could you read it back?
 4 (The reporter read back as requested.)
 5 A. I'm not aware of any notification to that
 6 effect.
 7 Q. (BY MR. EGLICK) And that's something you
 8 would know, wouldn't you?
 9 A. As I'm thinking about it, while there may not
 10 have been formal notification, it's likely that the
 11 manager for this subregion of EPA in the field who
 12 works out of our Lacey office most likely would have
 13 known about this, but I would expect that would be
 14 informally, and I'm not aware of any formal
 15 notification.
 16 Q. For example, formal notification meaning to
 17 the regional administrator of EPA; is that correct?
 18 A. Yes.
 19 MR. EGLICK: Why don't we break here for
 20 lunch. Does that work for everyone?
 21 MR. REAVIS: Fine.
 22 (Lunch recess taken 12:06 to 1:00 p.m.)
 23
 24
 25

AFTERNOON SESSION

1:00 P.M.

--oOo--

CONTINUING EXAMINATION

BY MR. EGLICK:

Q. Mr. Hellwig, did ecology place -- or did the port place ecology under substantial pressure with regard to the 401 application?

A. I'm not sure what you mean by substantial. The port was very interested in the decision-making process, the status of that.

Q. Well, would you use the phrase "substantial pressure" to describe what the port applied to ecology at times in the course of the 401 review?

A. No. I'd call it continuous interest or pressure if you want to call it that.

Q. But you wouldn't call it substantial?

A. No.

(Deposition Exhibit No. 81 was marked for identification.)

Q. (BY MR. EGLICK) Showing you what's been marked as Exhibit 81 to your deposition, Mr. Hellwig. Why don't you take a minute and see if you can identify it.

A. I remember the document.

Q. Did you write it?

A. Yes.

Q. Could you just read the heading on the document, the date, the to, the from, and the subject?

A. The date is May 12, 2000. It is to Joe Dear, Chief of Staff, Office of the Governor, from myself, Ray Hellwig, Regional Director, and the subject May 16 Meeting with Port of Seattle re the Third Runway.

Q. Could you look down -- do you see on the first page of this memo at the bottom it's got a line on it that says "Breif (very brief) History"?

A. I see that.

Q. Could you read into the record for me the first sentence after that heading of brief history?

A. "Nearly two years ago, in response to substantial pressure from the Port of Seattle, Ecology issued a heavily conditioned 401 Water Quality Certification for the third runway."

Q. And you wrote this memo again, right?

A. I did.

Q. Now, let's go back up and look at some other aspects of this memo. You start off by saying, quote, following is our assumption regarding the origin of the May 16 meeting along with background information for

likely agenda items, end quote. Do you see that?

A. Yes.

Q. So I take it, then, there was a May 16 meeting about the port's application for a 401 certification, May 16, 2000?

A. I was reading that paragraph. You asked me if -- please repeat that question.

Q. I said I take it that there was a May 16 meeting of some sort, 2000, concerning the port's application for 401 certification?

A. That was my assumption and my understanding.

Q. And then you have a heading, don't you, that says The Meeting?

A. Yes.

Q. And could you read what's underneath that?

A. "M. R. (Mic) Dinsmore, Executive Director for the POS, Port of Seattle, "apparently asked Martha Choe, Community Trade and Economic Development, "to arrange for a meeting between himself, the Governor, and Wes Ulman(?) The meeting has been scheduled for 4:00 p.m. on Tuesday the 16th, somewhere in Seattle (most likely the Seattle CTED offices)."

Q. Martha Choe was director of CTED, wasn't she?

A. That's correct.

Q. And what was her position in the ecology

review of the third runway project? Did she have a particular task that you had assigned her?

A. No.

Q. What about Wes Ulman? Was he working for ecology on review?

A. No.

Q. Do you know who he was working for?

A. No.

Q. So you wrote this memo to Joe Dear. It's dated May 12, right, 2000?

A. That's correct.

Q. Now, did you just wake up one morning and decide you wanted to write a memo to Joe Dear or how did this come about?

A. I'm going to take a moment to read this.

Q. Absolutely. Have you had a chance in the last few minutes to go through this document to your satisfaction, Mr. Hellwig?

A. Yes. For now. I didn't read every word on the second and third pages, but I went over it. So you'll need to remind me what the last question was.

Q. My question was, how did the meeting come about?

A. The May 16 meeting?

Q. I'm sorry. How did the memo come about? If

1 I said meeting, I misspoke.
 2 A. Memo came about through to my best
 3 recollection inquiries made from the governor's office
 4 regarding the status of the decision-making process,
 5 and now that I've seen this memo, I do remember having
 6 at least one phone conversation with John Savage, who
 7 was an AD reporting to Martha --
 8 Q. And an AD is what?
 9 A. Assistant director. -- and informed him
 10 essentially about what was happening with the
 11 decision-making process consistent with what is in the
 12 memo here, but I was asked to go ahead and put together
 13 a document for Mr. Dear based on my understanding or
 14 assumption that there was going to be this meeting, and
 15 this is what I produced.
 16 Q. And you said you had -- in this memo it says
 17 you had, quote, conversations we have had with senior
 18 Port of Seattle staff and John Savage, an AD reporting
 19 to Martha Choe, end quote. Now, does that statement
 20 mean that you had conversations with senior Port of
 21 Seattle staff and John Savage about this meeting that
 22 was upcoming on May 16?
 23 A. My recollection is I did some investigating
 24 into whether or not there would be a meeting and what
 25 the purpose would be. I'm not recalling specifically

1 who I talked to at the port. It very well may have
 2 been Elizabeth Leavitt, but I don't remember that for
 3 sure. Again, as I mentioned, I talked to John Savage
 4 trying to understand from his end what he knew about
 5 the meeting that was to happen.
 6 Q. Your first phrase under the heading Likely
 7 Agenda Items, could you read the first phrase before
 8 the word however, please, into the record? It starts
 9 "we are."
 10 A. "We are assuming that the meeting is campaign
 11 related, however, according to conversations we have
 12 had with senior Port of Seattle staff and John Savage,
 13 an AD reporting to Martha Choe, we expect the agenda
 14 will probably include."
 15 Q. And then you list a number of topics that has
 16 to do with the third runway and ecology's timetable for
 17 decision making; is that correct?
 18 A. That's correct.
 19 Q. And ecology wanting to convey to the --
 20 excuse me. The port wanting to convey to ecology,
 21 quote, the importance of the third runway project to
 22 this region, end quote, and so on, right?
 23 A. That's correct.
 24 Q. Now, when you were referring to campaign
 25 related, was that to some Clean Water Act campaign that

1 the governor was involved in that the port was meeting
 2 with him about?
 3 A. No. My assumption was that it was then
 4 connected to -- I don't remember which campaign.
 5 Q. It was a political campaign, wasn't it?
 6 A. Political campaign. I'm trying to remember
 7 the dates. It could have been the governor's.
 8 Q. The governor's reelection campaign, wasn't
 9 it?
 10 A. May have been.
 11 Q. Now, this memo, then, is about a
 12 campaign-related meeting to be held in as you
 13 understood it a government office, the CTED office; is
 14 that correct?
 15 A. That was my assumption.
 16 Q. And in addition to talking about the
 17 governor's reelection campaign, the port, you
 18 understood, was going to talk to the governor about
 19 moving the third runway along. Isn't that what this
 20 memo is about?
 21 A. The memo speaks for itself. I don't know if
 22 those words apply necessarily or not.
 23 Q. Well, the port wasn't going to ask the
 24 governor to slow down the third runway 401
 25 certification, was it?

1 A. I doubt it.
 2 Q. And you wrote this memo understanding that
 3 they were going to go in in a campaign meeting and
 4 complain to the governor -- a campaign meeting in a
 5 government office and complain to the governor about
 6 how ecology was dragging its feet on the 401
 7 certification; isn't that correct?
 8 A. It's not the way I would characterize it. I
 9 don't think it is the way I characterized it.
 10 Q. Could you read -- let me read to you. Quote,
 11 there may be allegations that ecology has expanded
 12 issues in an unreasonable manner, end quote. Who did
 13 you think those allegations were going to be coming
 14 from at this campaign meeting in a government office?
 15 Did you think they were going to come from ecology?
 16 A. No. They're coming from the port.
 17 Q. Now, to your knowledge -- well, did you get
 18 to attend this meeting?
 19 A. No.
 20 Q. Do you know if anyone from ecology attended?
 21 A. I don't know who attended the meeting.
 22 Q. Does ecology to your knowledge hold campaign
 23 meetings in ecology offices?
 24 MS. MARCHIORO: Objection; relevance.
 25 Q. (BY MR. EGLICK) Unless she instructs you not

1 to answer, Mr. Hellwig, please answer.
 2 A. Not that I'm aware of.
 3 Q. Could you take a look on the second page of
 4 this Exhibit 81? Do you see the heading that says
 5 Current Status of Ecology's Project Review Process?
 6 A. Yes.
 7 Q. Could you read the -- it's a parenthetical
 8 sentence. Could you read the last sentence into the
 9 record of that paragraph?
 10 A. Yes. "We have advised the Port of Seattle,
 11 provided our requirements are met, that this project
 12 can be permitted -- we have said that the technical
 13 issues are not as complex as those associated with the
 14 Battle Mountain Gold project."
 15 Q. Now, you use the term "we" in that sentence.
 16 By the way, when this memo was written, Tom Luster was
 17 still the ecology 401 permit coordinator, wasn't he?
 18 A. Yes.
 19 Q. Did you check that with Tom Luster before you
 20 wrote that sentence in a memo to the governor's chief
 21 of staff, Joe Dear, about this upcoming campaign
 22 meeting?
 23 A. That we in that sentence would have applied
 24 to the technical experts in the program and then also
 25 to the 401 coordinator.

1 one of them being you all the way?
 2 A. Yes.
 3 Q. And this is something that you were involved
 4 in in the course of your work on the 401 certification,
 5 I guess the work on the 401 certification in the year
 6 2000?
 7 A. Yes.
 8 Q. And who is Roger Nye?
 9 A. Roger Nye is -- he's a technical staff person
 10 with the toxics clean-up program. I believe he's a
 11 hydrogeologist.
 12 Q. So is he an expert in your view?
 13 A. Yes.
 14 Q. And who is Steve Alexander?
 15 A. Steve Alexander is the section manager for
 16 the toxics clean-up program at the northwest regional
 17 office. Roger works out of the northwest region as
 18 well.
 19 Q. Now, looking down at this -- the first e-mail
 20 in the thread, which is from Mr. Nye to you. Do you
 21 see that one, February 8, 2000, 2:56 p.m.?
 22 A. Yes.
 23 Q. Do you see the sentence in the second
 24 paragraph that says, quote, furthermore, the Port of
 25 Seattle is asking me for guidance regarding whether

1 Q. My question was did you check that statement
 2 with Tom Luster before you put it in this memo to the
 3 governor's chief of staff?
 4 A. I don't recall doing that.
 5 Q. I mean, there's no indication on here that
 6 this memo was cc'd to Tom Luster, is there?
 7 A. No.
 8 Q. One thing I was curious about with this memo
 9 is there's also no indication on it that it was to be
 10 held confidentially and not given to the port, is
 11 there?
 12 A. No.
 13 (Deposition Exhibit No. 82 was marked for
 14 identification.)
 15 Q. (BY MR. EGLICK) Showing you what's been
 16 marked as Exhibit 82 to your deposition. Would you
 17 take a look at it and then tell me if you can identify
 18 it?
 19 A. Yes.
 20 Q. What is it?
 21 A. It's an e-mail from Steve Alexander to me,
 22 John Wietfeld, and Dan Cargill regarding fill criteria
 23 for the third runway.
 24 Q. And is it what you would call an e-mail
 25 thread; that is, a back and forth among various people,

1 asphalt as construction debris is acceptable as fill as
 2 per the policy, end quote?
 3 A. Yes.
 4 Q. So what was the answer to that?
 5 A. The answer to that in this memo?
 6 Q. Yeah. Well, no, not in this memo. Do you
 7 know what ecology -- you've been the person involved in
 8 this.
 9 A. I don't remember the answer.
 10 Q. So you don't know as you're sitting here
 11 today whether ecology allowed asphalt to be placed as
 12 fill in the third runway project area; is that correct?
 13 A. My best recollection is that it would not
 14 have been allowed.
 15 Q. Is that a recollection or a hopeful guess,
 16 Mr. Hellwig?
 17 A. It's my recollection based on conversations,
 18 previous conversations with staff about acceptable fill
 19 criteria.
 20 Q. Is there any documentation for this
 21 recollection that you've now offered?
 22 A. I don't know.
 23 Q. What I was wondering about is when I look at
 24 this e-mail thread, your response to Mr. Nye comes at
 25 5:32 p.m. Do you see that?

1 A. Yes.

2 Q. And what I expected to see in this was
3 something that said absolutely not, no asphalt in the
4 fill. It's a no brainer. You didn't say anything like
5 that in your response, did you?

6 A. I was reading it. I'm sorry. Would you say
7 that again, please?

8 MR. EGLICK: Would you read back my question,
9 please?

10 (The reporter read back as requested.)

11 A. The response had to do with the broader
12 context of the whole situation; that is, how do we come
13 up with adequate resources to develop acceptable fill
14 criteria and monitor it in a way that we protect water
15 quality? The response is to context that isn't
16 necessarily provided in the lower message about how do
17 we deal with this capacitywise, resourcewise?

18 Q. (BY MR. EGLICK) It was a management issue
19 response worrying about management issues but not a
20 response that dealt with the environmental issue; isn't
21 that correct?

22 A. No.

23 Q. Can you point to a portion of your February 8
24 response, which is I think all of three sentences, that
25 addresses the environmental question raised by use of

1 asphalt construction debris as fill?

2 A. We were looking at a way to have capacity to
3 develop criteria and prevent fill that would
4 contaminate water, and if you look at Steve Alexander
5 response back to myself and John and Dan, it's coherent
6 that way insomuch as he's asking them to discuss
7 possible mechanisms with me for setting up a position
8 for the office, something along the lines of a prepaid
9 position set up as a project or developmental position
10 reporting to the RD.

11 Q. Absolutely I see where you're pointing to,
12 Mr. Hellwig, in terms of the management response, but
13 my question is where is the environmental response in
14 your e-mail?

15 A. The environmental response isn't in my
16 e-mail.

17 Q. Now, you were pointing, I think, to
18 Mr. Alexander, who is the top part of the thread, in
19 terms of setting up a position in the office that would
20 report to the RD. Is that you, regional director?

21 A. That's correct.

22 Q. And would address these questions of fill
23 posed by the port; is that correct?

24 A. The position as envisioned here as I
25 understand it would belong to the toxics clean-up

1 program and be available to let me know what was going
2 on with respect to the development of fill criteria and
3 overseeing and making sure and assuring that the
4 environmental issue would be addressed by the staff
5 that would be supported by this arrangement.

6 Q. Now, during the time, for example, that this
7 e-mail was exchanged, it's true, isn't it, that the
8 port was bringing fill onto the site under the rubric I
9 think they called it stockpiling; isn't that correct?

10 A. Fill was coming onto the site, and there was
11 an arrangement or agreement for screening the fill
12 established by the clean-up program prior to my coming
13 onto the scene as the management lead for the runway
14 decision.

15 Q. So the questions weren't just academic,
16 because there was actually fill coming in even as this
17 e-mail thread was being exchanged; is that correct?

18 A. That's my understanding.

19 Q. And, in fact, it's continued up until the
20 present, hasn't it, this stockpiling so-called?

21 A. That's my understanding.

22 Q. Now, did you ever provide the budget out of
23 the RD or the office that you had responsibility for to
24 set up a prepaid position such as was described in this
25 e-mail thread?

1 A. No.

2 Q. And tell me something, because you're
3 obviously an expert on the management and
4 administration at ecology. What is the toxics clean-up
5 program? What does that do?

6 A. The clean-up program is responsible for
7 overseeing the administration of the Model Toxics
8 Control Act.

9 Q. And that's the act that concerns itself with
10 contaminated soils; is that not correct?

11 A. Contaminated sites, yes.

12 Q. And the sites have what on them? They're
13 contaminated sites. What's on the site that's
14 contaminated? Isn't it the soils?

15 A. The soils primarily.

16 Q. So those are the folks in ecology who are the
17 experts on those issues of contaminated soils, aren't
18 they?

19 A. Well, I wouldn't say that's the only program
20 within the agency where we have experts on contaminated
21 soils, but that's where we have experts located to deal
22 with those issues.

23 Q. And that is their primary focus, isn't it?

24 A. For some of them, yes.

25 (Deposition Exhibit No. 83 was marked for

1 identification.)

2 Q. (BY MR. EGLICK) Showing you what's been
3 marked as Exhibit 83 to your deposition. Would you
4 take a look at it and tell me if you can identify it?

5 A. I'll take a moment to look at it.

6 Q. Sure.

7 A. Okay.

8 Q. Have you had a chance to look at it?

9 A. (Nodding head).

10 Q. Can you identify this?

11 A. Well, it's an e-mail from myself to Tom
12 Luster and several other agency staff, managers,
13 technical staff, and it's regarding or it's a string of
14 e-mail where I forwarded on to these folks messages
15 with attachments I've sent to Joe Dear regarding the
16 meeting that was being set up for May 16 in which Joe
17 was to attend.

18 There's a -- it indicates that I sent a
19 message to Joe with the attachment, then I sent him a
20 follow-up message with an addendum or some other
21 information about assumptions we were making, and then
22 I passed all of this along to staff within the agency I
23 assumed to be interested in.

24 Q. So I kind of helped you out here. You did
25 actually share this with these other folks, didn't you,

1 the memo that we talked about before?

2 A. Yes.

3 Q. Now, in doing that, in this transmittal, you
4 said something interesting at least to me. If you look
5 at the paragraph that starts, "This is an
6 administrative problem." Do you see that paragraph?

7 A. Yes, I do.

8 Q. And then you see the sentence that goes,
9 quote, we can't certify CZM consistency without the 401
10 and vice versa? Do you see that?

11 A. Yes.

12 Q. What does that mean?

13 A. Well, it means that we can't agree with the
14 determination of coastal zone management consistency
15 made by a project proponent if part of that consistency
16 is contingent upon a decision on a 401 certification,
17 and it's a situation wherein in the regulations the
18 time frame for the CZM is six months and expires before
19 the time frame does for making a 401 decision, which is
20 one year, and so if we have not made a decision on the
21 401 within the six-month time frame before the CZM
22 expires, then it's necessary for a proponent to
23 withdraw and then resubmit the CZM consistency
24 determination paperwork.

25 Q. Can you have a CZM consistency determination

1 for the Port of Seattle third runway project in the
2 absence of a 401 certification?

3 A. If we issue a 401 certification, that's one
4 of the things that -- that's one of the instruments
5 required for the consistency determination.

6 Q. So if there is no legal effective 401
7 certification, what's your understanding of whether
8 there can be a CZM consistency determination?

9 MS. MARCHIORO: Objection; calls for a legal
10 conclusion.

11 Q. (BY MR. EGLICK) Go ahead. You can answer,
12 Mr. Hellwig, your understanding based on your position
13 as --

14 A. My understanding would be that if a 401 were
15 overturned that that would create an issue with the CZM
16 consistency determination.

17 Q. And that's because you have to have an
18 effective 401 certification to support a CZM
19 consistency determination?

20 A. That's my understanding.

21 (Deposition Exhibit No. 84 was marked for
22 identification.)

23 Q. (BY MR. EGLICK) Looking at what's been marked
24 as Exhibit 84 to your deposition. Can you identify it?

25 A. I'll take a moment, please.

1 Q. Sure.

2 A. Yes. I'm familiar with this.

3 Q. Why don't you tell us -- this is an e-mail
4 you sent to Tom Fitzsimmons, right?

5 A. Yes, it is.

6 Q. Dated?

7 A. May 19, 2000. It's regarding the third
8 runway.

9 Q. And it's a follow-up, isn't it, to that
10 previous memo you sent on the governor's meeting, isn't
11 it, with the port?

12 A. I don't know if it's a direct follow-up or
13 not. I expect there were -- let's see. This is May
14 19. There may have been another message in between.
15 Let me see. But --

16 Q. Let's look at --

17 A. Let me read it.

18 Q. Go ahead. I thought you had.

19 A. I skimmed it. I'm familiar with the
20 document. It gives him more information on the status
21 of the decision-making process and how I'm going to go
22 about keeping him informed with regard to key issues.

23 Q. Looking at the first paragraph. It says,
24 quote, Tom, the July '00 -- I guess that's 2000. Is
25 that what that would be?

1 A. That's correct.
 2 Q. -- decision making timeframe is going to be
 3 tight for us, but we'll give it our best shot, end
 4 quote. What July decision-making time frame are you
 5 referring to?
 6 A. Well, that would have been for the 401 and
 7 for CZM consistency.
 8 Q. In other words, someone had established a
 9 time frame that you were going to make a decision in
 10 July 2000?
 11 A. The way it worked was I would pull staff
 12 together, ask what would be needed in order for us to
 13 make a decision. I would ask them to estimate how much
 14 time that would take and then based on those
 15 discussions and those estimates would project out
 16 possible time lines for a decision but always make it
 17 clear that decisions would be contingent upon us
 18 receiving adequate information from the port and having
 19 time to review it.
 20 Q. So was this July time frame communicated to
 21 the governor?
 22 A. I don't know. It's possible. It's my
 23 assumption that it was.
 24 Q. The governor in turn, your assumption is,
 25 communicated it to the port?

1 A. Let me clarify. My assumption is that it
 2 would have been communicated to the governor's chief of
 3 staff.
 4 Q. Now, I notice a heading on this e-mail that
 5 says "making a commitment to place-hold time through
 6 July '00 for regularly scheduled internal meetings and
 7 meetings with Port of Seattle staff." That means put
 8 it on your calendar? Is that what that means?
 9 A. Well, it would mean either put it on their
 10 calendar or be prepared to arrange time to get it on a
 11 calendar; in other words, make it a high priority.
 12 Q. And then I'm looking under "developing a
 13 definitive list of issues for the proposed runway." Do
 14 you see that?
 15 A. Yes.
 16 Q. There's a commitment in there, isn't it, to
 17 make weekly reports to the director on the status of
 18 the third runway application? See that?
 19 A. Yes.
 20 Q. And then you say you'll use the list, quote,
 21 as a tool to help manage staff time. Do you see that
 22 quote?
 23 A. Yes.
 24 Q. And then, quote, for issues that are
 25 resolved, staff will be directed to begin drafting 401

1 language, end quote.
 2 A. Yes.
 3 Q. What does that mean?
 4 A. My best recollection is that we assumed it
 5 would be helpful to develop draft language for a 401
 6 that would help us discuss and debate pertinent issues.
 7 Q. Well, in other words, if an issue was
 8 resolved, you would draft language to discuss and
 9 debate whether it was resolved? Is that what you're
 10 testifying to?
 11 A. No. I think I can be clearer than that. I
 12 think that we were developing draft language that we
 13 would then go back and look at, and based on additional
 14 information we might receive based on discussions,
 15 continuing discussions we would have, that language may
 16 or may not be useful. My recollection is that shortly
 17 after discussing this approach we abandoned it. We did
 18 not stay with it.
 19 Q. So you didn't go with in the future or in the
 20 future past May 19, 2000, a system in which you
 21 designated some issues as resolved and some issues as
 22 unresolved?
 23 A. No. We attempted to do that, but what we did
 24 not do is draft 401 language.
 25 Q. But there were some issues that were

1 designated as resolved, weren't there?
 2 A. We had a table, and I can't remember if it
 3 was getting indicated resolved or not, but I think it
 4 may have, and it meant resolved for purposes of our
 5 internal discussions and being able to move on to
 6 additional issues. It did not mean resolved in the
 7 sense that we had reasonable assurance for a 401. It
 8 meant that we could move forward to the next issue.
 9 Q. So resolved and moving forward are not the
 10 same as resolved for purposes of 401. Is that your
 11 testimony?
 12 A. Yes.
 13 Q. So if it's not resolved for purposes of 401
 14 and it's not resolved for purposes of moving forward,
 15 was it resolved for purposes of discussion with the
 16 port?
 17 A. Maybe I misunderstood you. It was resolved
 18 for purposes of moving forward -- maybe I misunderstood
 19 you -- in working through the issues internally and
 20 externally with the port but not necessarily resolved
 21 for purposes of the 401.
 22 Q. So the Port of Seattle, it's your testimony,
 23 knew that when you told them an issue was resolved,
 24 that didn't necessarily mean that you wouldn't go ba
 25 later and say it wasn't resolved for purposes of the

1 401; is that correct?

2 A. I can't speak for the port, but I think we
3 tried to make it clear that it was possible as we
4 worked through issues that additional issues could
5 emerge or that through public comment or input issues
6 might come to our attention that would need to be
7 addressed.

8 Q. Wasn't one of the concerns as you put it
9 earlier -- you used that term earlier -- that the port
10 had that issues that it had thought were resolved
11 ecology did not agree were resolved?

12 A. My recollection is that the port would become
13 concerned about issues that would arise or result from
14 our continuing analysis because they were complex and
15 difficult.

16 Q. And wasn't this suggested way of proceeding
17 that we're talking about here an effort to mollify that
18 concern by stating that some issues would be labeled as
19 resolved in the course of the process?

20 A. It was an effort to manage the process,
21 document the process in a way that would help us move
22 forward.

23 Q. So it was a management tool for the 401
24 decision; is that correct?

25 A. Essentially.

1 Q. And that's what your expertise really is in,
2 isn't it, is in management?

3 A. My expertise is in managing the process,
4 pulling the people together, ensuring adequate
5 resources are devoted to the process so that we could
6 work through issues and ultimately reach a decision.

7 Q. Now, did it come about at some point that the
8 port had to withdraw the 401 certification request that
9 it had had pending over, for example, the summer of
10 2000?

11 A. Yes.

12 Q. And that withdrawal came about because
13 ecology -- please correct me if I'm wrong -- told the
14 port if you don't withdraw it, we're going to have to
15 deny it?

16 A. Yes.

17 Q. And was there a climactic meeting at which
18 that was -- you're smiling, so I must be on the right
19 track. Either that or I'm way off. Was there a
20 climactic meeting at which that came to a head with the
21 Port of Seattle?

22 A. I don't know if I'd describe it as a
23 climactic meeting, but we had a meeting because the
24 time frame -- the legal time frame that we had or
25 amount of time we had to make a decision was going to

1 end, and I think that there needed to be some clear
2 communication around what the status of the
3 decision-making process was with regard to whether or
4 not we had reasonable assurance and we could approve
5 the 401.

6 Q. When was the meeting?

7 A. I don't have exact dates for you, but I'm
8 sure you can produce a document that will have an exact
9 date on it.

10 Q. It was September 2000, wasn't it, just a day
11 or two before the deadline?

12 A. It was in September of 2000, that's correct.

13 Q. Where was the meeting?

14 A. Port of Seattle.

15 Q. Now, is it true for this that Mic Dinsmore
16 actually had to fly in from was it Hawaii or Scotland
17 or Ireland or outer Hebrides or something like that?

18 A. It's my understanding he was on a trip in
19 Europe and he needed to come back for this among other
20 things.

21 Q. And so ecology folks were summoned to
22 Dinsmore's office at the Port of Seattle?

23 A. I wouldn't say we were summoned.

24 Q. Well, how did you happen to end up there
25 rather than Lacey or your office out in Bellevue? How

1 did you happen to end up down at the applicant's
2 office? Wasn't it down on -- is that on Western or
3 Alaska or something like that?

4 A. Down at Pier 69 or 63.

5 Q. Here in Seattle?

6 A. Yes.

7 Q. So how did you happen to end up there?

8 A. Centralized location.

9 Q. Central to what?

10 A. To the port staff, ecology. It's not real
11 central for the director, but he came up.

12 Q. The director actually came to the meeting
13 from Lacey?

14 A. That's my recollection.

15 Q. Now, were you there?

16 A. I was at a meeting in September where we
17 informed the port. I was there. The director was
18 there.

19 Q. And was anyone else from ecology there?

20 A. I believe Kevin Fitzpatrick was there.

21 Q. Anyone else from ecology?

22 A. Eric Stockdale may have been, but I don't
23 recall specifically.

24 Q. And who was there for the port?

25 A. Mic Dinsmore, Gina Marie Lindsey. I believe

1 Elizabeth Leavitt was there and Michael Cheyne. There
 2 were other individuals there. I'm not recalling.
 3 Q. Was Tom Luster there?
 4 A. I don't believe he was.
 5 Q. Now, he's the 401 coordinator, isn't he?
 6 A. That's correct.
 7 Q. And until he was removed from this thing, he
 8 was at all the critical meetings, wasn't he?
 9 A. There had been other meetings with the port
 10 where he wasn't present.
 11 Q. Well, I think what I asked you was he was at
 12 all the critical meetings, wasn't he?
 13 A. No.
 14 Q. Can you name another meeting that took place
 15 with the level of importance of a meeting where you're
 16 going to tell the port they don't have reasonable
 17 assurance where the 401 coordinator from ecology didn't
 18 attend?
 19 A. My understanding was you asked if there were
 20 other critical meetings, and I had referred to other
 21 meetings with the port executive management -- I didn't
 22 say executive management, but other high level meetings
 23 at the port headquarters offices where he was not
 24 present that I considered to be critical.
 25 Q. Okay. So you're telling me there were other

1 meetings at the port office that Tom was excluded from?
 2 A. There were other meetings with the port where
 3 a lot of ecology staff didn't attend. It was --
 4 Q. How many 401 coordinators does the statewide
 5 Department of Ecology have?
 6 A. I don't have the exact number. We have -- we
 7 regionalized the function, so we had a 401 coordinator
 8 in the region, and before we regionalized the function,
 9 the runway project was being dealt with by Tom Luster
 10 out of Lacey, out of headquarters. When we
 11 regionalized the function, we didn't regionalize that
 12 specific permit, so I believe we had two, three, four,
 13 or five coordinators statewide.
 14 Q. Statewide 401 coordinators?
 15 A. I believe we had one at the time covering
 16 eastern Washington, one at the southwest region, one at
 17 the northwest region, and one or two at headquarters.
 18 Q. Tom Luster's writ, though, ran to the whole
 19 state, didn't he?
 20 A. Yeah. Tom was the senior 401 staff person,
 21 and he had --
 22 Q. In the whole state; isn't that correct?
 23 A. Yes.
 24 Q. And he was also the person assigned to be the
 25 coordinator on the runway application; is that correct?

1 A. Yes. At that time he was.
 2 Q. So how did it happen that Tom didn't get to
 3 go to this meeting but, for example, Kevin Fitzpatrick
 4 did?
 5 A. Tom had done his job, and at that point, what
 6 was driving our position was the technical substantive
 7 concerns that Kevin Fitzpatrick, section manager for
 8 the water quality program, where it was more
 9 appropriate for him to represent those concerns, the
 10 stormwater management plan.
 11 Q. Who made the decision not to bring Tom Luster
 12 to the meeting?
 13 MS. MARCHICRO: Objection; lack of
 14 foundation.
 15 A. I'm not recalling it was an overt decision to
 16 exclude anybody. My recollection is we talked about
 17 who should come, and we --
 18 Q. (BY MR. EGLICK) Who is we?
 19 A. Tom Fitzsimmons and I.
 20 Q. The director?
 21 A. The director.
 22 Q. Did Tom Luster's name come up in the
 23 conversation as to who should come or did no one think
 24 that the senior 401 coordinator in the whole state
 25 should go to such a meeting?

1 A. His name may have come up.
 2 Q. And what result?
 3 A. Well, obviously we decided who should come.
 4 It was Tom Fitzsimmons, myself, Kevin Fitzpatrick. I
 5 think Eric Stockdale was there. I can't remember for
 6 sure. We decided that's who we needed to be at that
 7 meeting. Tom had been at previous meetings and helped
 8 us arrive at the position we were at. He did his job.
 9 Q. Was there any conversation about Tom Luster
 10 at the meeting with the port in September?
 11 A. Not that I recall.
 12 Q. Were there any agreements made with the port,
 13 commitments, undertakings with the port at that meeting
 14 in September?
 15 A. Yes.
 16 Q. And were they all reduced to writing?
 17 A. I believe that we did come up with a document
 18 summarizing various commitments.
 19 Q. I asked whether all of the agreements,
 20 undertakings, commitments were reduced to writing, so
 21 that's the question I'd like you to focus on, please.
 22 A. I don't remember.
 23 Q. So you can't recall whether there were some
 24 agreements, undertakings, commitments that were made
 25 but were not put in the document you say you came up

1 with?

2 A. For example, I don't recall if the document
3 that is vague in my mind referred to the commitment we
4 made to adding structure to the permit review process
5 to help us make our decision. I don't recall as an
6 example whether or not that was in that document.

7 Q. Now, did the governor or the governor's
8 office have any involvement in anything having to do
9 with that meeting at the port's office?

10 A. Joe Dear was at that meeting. To my best
11 recollection, he was there.

12 Q. And he was there because of his technical
13 expertise on what aspect of the 401 application?

14 A. He was there because there was interest at
15 his level in the status of the decision-making process.

16 Q. What level is Joe Dear at?

17 A. Chief of staff to the governor at the time.

18 Q. Have you ever been involved in a 401 decision
19 before where the governor's chief of staff has attended
20 a meeting with an applicant?

21 A. No.

22 Q. In fact, in this case, the governor's chief
23 of staff attended more than one meeting with the
24 applicant; isn't that right?

25 A. That's correct.

1 Q. Now, is Mr. Dear -- let's take a look here at
2 Tom Luster's credentials. This is from his
3 declaration. Tom Luster has, would you agree, a
4 Masters of Science degree in resource geography from
5 Oregon State University?

6 A. I looked through that, and I seem to recall
7 seeing that.

8 Q. Now, what's Mr. Dear's credentials along
9 those lines? Does he have any?

10 A. I don't know.

11 Q. Does he have a Bachelor of Science in
12 anything that you know of?

13 A. I don't know.

14 Q. Is he a member of the Society of Wetland
15 Scientists like Tom Luster is?

16 A. I don't think so.

17 Q. So what did he contribute to this meeting
18 where you say you really needed your technical experts
19 there?

20 A. I seem to recall that I said we needed our
21 technical experts there to talk about the water quality
22 issues, the stormwater issues.

23 Q. What did you need Joe Dear there for?

24 A. Joe Dear is my boss's boss. He wanted to be
25 there.

1 Q. How do you know he wanted to be there?

2 A. It's my understanding.

3 Q. In other words, someone told you Joe Dear is
4 going to this meeting?

5 A. That's my understanding.

6 Q. Or was it that Joe Dear told you guys, You're
7 going to this meeting at the Port of Seattle?

8 A. I don't recall what interactions drove that
9 meeting, who talked to whom to drive the meeting. I
10 don't recall that.

11 Q. Well, do you recall ever calling up the port
12 and saying, We'd sure like to come over to your office
13 down at the World Trade Center and have a meeting with
14 you and bring Joe Dear along?

15 A. I don't understand the question.

16 Q. Did you request the meeting at the Port of
17 Seattle offices with Joe Dear in attendance?

18 A. I don't recall if it was Joe Dear who asked
19 to have it organized, Tom Fitzsimmons, or if I made the
20 recommendation. It may have come from Tom Fitzsimmons.
21 It may have come from Joe Dear.

22 Q. When is the first time you met Joe Dear?

23 A. In person? I talked with him on the phone,
24 traded messages with him previously. I first met him
25 in person at Port of Seattle offices.

1 (Recess taken.)

2 Q. (BY MR. EGLICK) Mr. Hellwig, do you recall
3 whether any other written -- unwritten commitments
4 other than the one you mentioned were made at that
5 September 2000 I guess what I called the climactic
6 meeting at the Port of Seattle? You're smiling again.

7 A. Just at your characterization.

8 Q. Was it an anticlimax for you?

9 A. Pardon me?

10 Q. Was it an anticlimax for you?

11 A. No. I just knew the process was going to
12 continue. No. Without seeing the document and not
13 recalling what was in it and what wasn't -- and
14 obviously I'm not remembering everything I put into
15 documents or I would have remembered that I said there
16 was substantial pressure at one point on this project.

17 Q. Now, when you say put in the document, you're
18 talking about what document?

19 A. I'm talking about -- I'm recalling a document
20 -- and I'm recalling that we disclosed it as well at
21 some point -- where we summarized from that meeting we
22 had in September 2000 some of our respective
23 commitments relating to making a 401 decision, and I
24 seem to recall, for example, in that document a
25 commitment to if the port could provide us adequate

1 information with enough time for us to review it that a
2 decision was possible within a six-month time frame.

3 I remember us being uncomfortable doing that,
4 but I remember us saying that if we received the
5 information on time and it was adequate and it met our
6 requirements that we might be able to make a decision.
7 We tried to be clear in that memo with regard to --
8 actually, one of our commitments was to be as clear as
9 possible what would be required for an approval.

10 Q. Did you ever tell the Port of Seattle that it
11 wouldn't need to get a water right in connection with
12 addressing in-stream flow needs for the project?

13 A. Yes.

14 Q. Tell me about water rights in the northwest
15 regional office. Who is that handled by?

16 A. The section manager is Dan Swenson.

17 Q. And that's a section you never worked in; is
18 that right?

19 A. I managed that section for a while, for a
20 time.

21 Q. The question I'm asking is did you work in
22 the section?

23 A. I don't understand the difference.

24 Q. Well, were you ever someone who reviewed
25 water right applications?

1 A. I didn't review water right applications for
2 purposes of writing a report of exam, which would be a
3 recommendation as to an approval or a denial for a
4 supervisor to sign off on. I would have been the
5 manager who would see that information, see the
6 application, see the report of exam after a staff
7 person would have done the work around making a
8 recommendation for a decision.

9 Q. And are you based on some particular training
10 that you've had an expert in water rights?

11 A. I had continuous daily training from the
12 technical experts in that program, the hydrogeologists,
13 over and over again on hydrology and hydrogeology and
14 how under certain circumstances base flows could be
15 affected by withdrawal of groundwater, for example, so
16 I had extensive ongoing training from technical experts
17 with lots of training and education.

18 Q. So, in other words, you're saying that you
19 learned how to be a hydrogeologist by watching other
20 people do it?

21 MS. MARCHIORO: Objection; mischaracterizes
22 the testimony of the witness.

23 A. I'm not saying that.

24 Q. (BY MR. EGLICK) You're not a hydrogeologist,
25 are you?

1 A. No.

2 Q. And you're not a lawyer either, are you?

3 A. No.

4 (Mr. Witek joined the proceedings.)

5 Q. So other than this description that you've
6 given of information or expertise acquisition that
7 you've offered, is there some formal training you've
8 had in water rights?

9 A. No.

10 Q. Do you know who Rachael Paschal Osborn is?

11 A. Yes.

12 Q. Is she an expert in water rights?

13 A. My understanding is that she's a legal expert
14 on water rights.

15 Q. What about your counsel, Joan Marchioro?

16 A. She's a legal expert on everything we do.

17 Q. I guess from Joan's point of view that was
18 the right answer, right?

19 MS. MARCHIORO: No. Completely wrong from my
20 point of view.

21 MR. EGLICK: I guess we'll give you, Joan, a
22 chance to answer it yourself later.

23 MS. MARCHIORO: You may; you may not.

24 Q. (BY MR. EGLICK) Do you know who Pete Kmet is?

25 A. Yes.

1 Q. And can you tell me who he is?

2 A. He's a staff person with the toxics clean-up
3 program working out of the Lacey office.

4 Q. Is he an expert with regard to soils
5 contamination?

6 A. I don't know with any specificity what his
7 expertise is. He is an expert within that program, and
8 I would assume that he has expertise related to
9 contaminated soils.

10 Q. If you were managing a program and you had
11 somebody in there working in it as an expert in that
12 capacity, you wouldn't let them work there unless they
13 were an expert, would you?

14 A. No.

15 Q. So you have no reason to believe he's not an
16 expert, do you?

17 A. No.

18 Q. Do you know who Chung Yee is?

19 A. Yes.

20 Q. Now, where does he work?

21 A. Presently with toxics clean-up program in
22 Lacey, prior to that with the water quality program, as
23 an engineer with the water quality program in Bellevue.

24 Q. And Kevin Fitzpatrick, why don't you just
25 remind us for the record who he is and where he works.

1 A. He is section manager for the water quality
2 program in the Bellevue -- out of Bellevue, northwest
3 region.

4 Q. Now, when you were putting together this 401
5 certification, both the August one and September one,
6 you were trying to figure out what to do about fill
7 criteria. You know what I mean when I refer to fill
8 criteria?

9 A. Acceptable fill criteria. Yes.

10 Q. Were you aware that the criteria that were
11 being proposed for adoption by ecology were ones that
12 Pete Kmet had cautioned would not do the job in some
13 respects in terms of protection of the environment?

14 MR. REAVIS: Objection to the
15 characterization of the evidence.

16 Q. (BY MR. EGLICK) Go ahead and answer.

17 A. My understanding was that within that program
18 there were some mixed views with respect to the
19 appropriateness of applying the criteria to this
20 project, and my understanding was some of the concern
21 had to do with MTCA itself and whether or not we were
22 improperly invoking MTCA, which we were not, and that
23 some of the concern related to the criteria went away
24 when we clarified that for purposes of this project we
25 were not invoking MTCA.

1 Q. Well, weren't some of the concerns about
2 regardless of whether the criteria were based on MTCA
3 or not that the criteria did not provide protection
4 necessary to meet water quality standards?

5 A. I'm not familiar with the concerns that
6 you're referring to.

7 (Deposition Exhibit No. 85 was marked for
8 identification.)

9 Q. (BY MR. EGLICK) Looking at what's been marked
10 as Exhibit 85 to your deposition. Can you identify it?

11 A. Well, this is an e-mail from me to Tom Luster
12 and Joan Marchioro. Attached to it is an e-mail from
13 Chung Yee to me, and below the string has an e-mail
14 from me to Kevin Fitzpatrick and Chung Yee, and that's
15 attached to one from Andrea Grad --

16 Q. Of my office; is that right?

17 A. Yes.

18 Q. I won't make you identify her.

19 A. Referring to -- oh, it was from Andrea to me.
20 The subject was use of contaminated fill, and it refers
21 to an attachment from Peter Eglick, yourself, on behalf
22 of the ACC.

23 Q. Now, can you look at the top of this e-mail
24 thread? You've got a message from Chung Yee to you
25 dated September 6, 2000. Do you see that?

1 A. Yes.

2 Q. He says, quote, in any case, the Method A
3 soil cleanup levels are, quote, based on protection of
4 ground water for drinking water use, end quote.

5 A. I see that.

6 Q. What does that mean to you?

7 A. I'm looking at it. Well, that the soil would
8 have to be clean enough to protect water to high enough
9 standards that it could be used for drinking purposes.

10 Q. Okay. Now, do you see the next sentence in
11 Chung Yee's e-mail, quote, for many but not all of the
12 contaminants in Method A table, the National Primary
13 Drinking Water Standards are lower than the water
14 quality standards for surface waters, end quote? Do
15 you see that?

16 A. Yes.

17 Q. What does that mean to you?

18 A. That's not clear to me. That's not clear to
19 me if lower means more protective or less protective.

20 Q. Well, did you send Chung Yee back an e-mail
21 saying I've got a question about that?

22 A. I remember having live conversations with
23 him, but I don't remember or see, at least not attached
24 here, an e-mail back to him. I see an e-mail from me
25 to Tom Luster and Joan Marchioro.

1 Q. Well, you can have chlorinated drinking
2 water, can't you?

3 A. Yes.

4 Q. But state water quality standards aren't
5 going to allow you to have a whole bunch of chlorine in
6 class double A waters, are they?

7 A. I'm not an expert. I'd go talk to the water
8 quality program about that.

9 Q. So you don't know?

10 A. It's my understanding there can be a concern
11 with chlorination.

12 (Deposition Exhibit No. 86 was marked for
13 identification.)

14 Q. (BY MR. EGLICK) Looking at what's been marked
15 as Exhibit 86 to your deposition. Can you identify it?

16 A. It's an e-mail from Tom Luster to me printed
17 off of his machine, it looks like. Attached to it is
18 an e-mail from Andy McMillan to the shorelines and
19 environmental assistance program in the regions and at
20 headquarters and Padilla Bay, it looks like, Lessons
21 Learned From Big Projects - the official version, High.

22 Q. And then what's attached and do you recognize
23 it?

24 A. Attached to it is a document, Lessons Learned
25 From Big Projects, Recommendations for the SEA Program.

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1 This is something that staff were asked to put together
2 with respect to how ecology approaches big projects and
3 what are some of the lessons we've learned over time.

4 Q. And this was put together in the aftermath,
5 wasn't it, of Battle Mountain Gold?

6 A. I believe so.

7 Q. And what happened in Battle Mountain Gold,
8 wasn't it, is that ecology went ahead and approved the
9 401 and then was reversed by the PCHB; isn't that
10 correct?

11 A. That's what I recall.

12 Q. And Tom Luster had opposed approval of the
13 401, hadn't he?

14 A. That's also my recollection.

15 Q. And in the aftermath of Battle Mountain Gold,
16 the question that this memo was addressing is how do we
17 make sure that we don't make the same mistakes again;
18 is that correct?

19 A. Well, it's recommendations on things that we
20 should think about when we're approaching a major
21 project so we can end up making a defensible decision
22 that protects the environment.

23 Q. What's your understanding of the expression
24 "end run," Mr. Hellwig? If I'm making an end run
25 around staff, what am I doing?

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1 A. Uh-huh.

2 Q. So the people that are supposed to be making
3 the decisions are essentially put under pressure from
4 above or cut out of the process by those above; is that
5 correct?

6 A. That can happen, yes.

7 Q. And that's part of what you understand an end
8 around or an end run to be?

9 A. Yes.

10 Q. Would you take a look at, I guess, the second
11 page of this Exhibit 86? I wonder if you could look at
12 that bold heading number 2 and read that into the
13 record if you would.

14 A. I have number 2 on the first page. You mean
15 the second page after the --

16 Q. Yeah.

17 A. I got it. Okay. I see it.

18 Q. Can you read that into the record, please?

19 A. "Managers should not reward project
20 applicants' attempts to get early assurances or do an
21 end-around project staff."

22 Q. And then it goes on to say, quote, doesn't
23 it, many project applicants will try to get ecology
24 managers to assure them that a project is permissible
25 or will go to managers to get relief when project staff

1 A. Well, my interpretation would be that you
2 have a process set up where individuals are keeping
3 each other informed up and down a hierarchical chain
4 and within perhaps a group of technical peers and
5 somebody would decide that they would go around and
6 establish a process -- they would step outside of a
7 process that has been established and agreed to for
8 solving a problem, reaching a decision, or whatever,
9 goes around it to try to influence an outcome without
10 the benefit or the use of that process that's been set
11 up.

12 Q. So it's kind of an end around, I guess you'd
13 call it, maybe not an end run but an end around?

14 A. That's my interpretation.

15 Q. Is that correct?

16 A. That's my interpretation, yes.

17 Q. And it can mean going up the ladder of
18 command out of line so to speak and trying to fix
19 things at a higher level, can't it?

20 A. It can mean that or it can mean -- it can be
21 done at a staff level as well to try to influence other
22 staff --

23 Q. So we've got --

24 A. -- to ultimately get to a higher level.

25 Q. Higher management?

1 are making requests or demands that applicants find
2 unreasonable, end quote. Do you see that?

3 A. Yes.

4 Q. Then it goes on to suggest there are several
5 ways, quote, that ecology management can support staff
6 and prevent applicant, quote, end-arounds, quote. Do
7 you see that?

8 A. Which bullet is that in?

9 Q. It's in the same one.

10 A. Uh-huh. Yes.

11 Q. Could you read the first bulleted item there
12 into the record, "management should not"?

13 A. "Management should not make any commitments
14 or give assurances to project applicants regarding
15 permit approval timelines or decisions without buy-in
16 from appropriate project staff."

17 Q. And then can you read the second one into the
18 record as well, please?

19 A. "When senior managers meet with project
20 applicants they should include lead project staff or
21 lower level managers in the meetings. All managers
22 need to keep project staff informed of meetings that
23 have occurred with applicants and what was communicat
24 -- heads-ups." "Heads-ups" in quotes it says, "work
25 both ways."

1 Q. And could you read the third bullet?
 2 A. "Managers need to talk to staff before they
 3 respond to complaints (especially personal attacks) and
 4 give staff the benefit of the doubt. Most attempts by
 5 applicants to circumvent staff are really attempts to
 6 circumvent requirements for additional information or
 7 mitigation."
 8 Q. Now, are you aware that Ann Kenny testified
 9 in her deposition that one of the problems with Tom
 10 Luster that she heard about was that consensus would be
 11 reached on issues except Tom wouldn't agree with the
 12 consensus that had been reached with the port?
 13 A. I'm not aware of her testimony, her specific
 14 testimony.
 15 Q. You haven't talked with anyone about it or
 16 reviewed it?
 17 A. I've heard just a couple of comments about
 18 how the deposition went and a couple of references to
 19 topics discussed in the deposition but none of the
 20 specifics from the deposition.
 21 Q. Well, would you agree with that
 22 characterization that I'm describing to you of Tom
 23 Luster?
 24 A. Would you read the characterization again,
 25 please?

1 Q. Well, I wasn't reading. I was actually
 2 paraphrasing. What she intimated or what she said was
 3 that Tom was not -- what Ann Kenny said was that Tom
 4 Luster was not going along with the consensus reached
 5 by ecology staff and the port and that that was
 6 creating problems.
 7 MS. MARCHIORO: Objection. I think that
 8 mischaracterizes the witness's testimony in the prior
 9 deposition that you're referring to. If you could show
 10 Mr. Hellwig the particular excerpt, I would appreciate
 11 that.
 12 Q. (BY MR. EGLICK) Well, let's assume
 13 hypothetically that Ann Kenny testified to that, and
 14 let me ask you if that was what she testified to, would
 15 you agree with that characterization?
 16 A. That's not the way I would characterize Tom
 17 Luster's participation in our meetings or our
 18 decision-making processes.
 19 Q. And what would you disagree with about that
 20 characterization?
 21 A. I would disagree that our decision-making
 22 processes were a function of a need for consensus
 23 necessarily. When we would have our meetings, I would
 24 ask lots of hard questions to make sure that issues
 25 would be thoroughly discussed.

1 Tom Luster is a very thorough person himself,
 2 and what I would say is that I would have concerns that
 3 Mr. Luster would not always understand his appropriate
 4 role with respect to consulting with and accepting
 5 conclusions of technical experts in the programs who he
 6 would in his role as 401 coordinator be expected to
 7 rely upon. That's how I would characterize it. There
 8 would be situations where that would occur.
 9 Q. In other words, where someone else involved
 10 in the DOE discussion would say I think it's this way
 11 and Mr. Luster would say, no, I don't think that's
 12 accurate or defensible, and what you're saying is that
 13 he should have acquiesced with what the other person
 14 had said; is that correct?
 15 A. I'm saying that on frequent occasions I would
 16 support Mr. Luster's inquiry because I was very
 17 concerned about us reaching a decision that would be
 18 defensible. However, when it was clear to me and
 19 sometimes others I could tell or they would indicate it
 20 was clear to them that the technical experts who
 21 Mr. Luster was supposed to rely upon were being clear
 22 about conclusions with respect to an issue, that then
 23 it would be important for Tom to say, I understand, let
 24 me account for that in my decision or in my decision
 25 recommendation.

1 Q. And would you consider Mr. Luster himself a
 2 technical expert?
 3 A. Not necessarily. It depends on with respect
 4 to what.
 5 Q. Wetlands?
 6 A. The technical expert with respect to wetlands
 7 for purposes of this decision and other 401 decisions,
 8 some of which which I signed off on, was Eric
 9 Stockdale.
 10 Q. Well, that's not the question I asked,
 11 though. I asked you whether you would consider
 12 Mr. Luster a technical expert with respect to wetlands.
 13 A. No.
 14 Q. You're aware that he's a member of the
 15 Society of Wetland Scientists?
 16 A. No.
 17 Q. Do you know whether Mr. Stockdale is a member
 18 of the Society of Wetland Scientists?
 19 A. Not remembering for sure the exact title of
 20 the organization but assuming that it's the one that
 21 you're referring to that I'm familiar with, yes, he is.
 22 Q. And is that a credential that's meaningful?
 23 A. It has some meaning.
 24 Q. Do you know how you get to be a member of the
 25 Society of Wetland Scientists?

1 A. I don't know all the requirements.

2 Q. Do you know any of them?

3 A. I believe there's certain education and
4 certain experience requirements, but I don't know them
5 in detail.

6 Q. What about with regard to analysis of issues
7 having to do with hydrology? Do you know whether
8 Mr. Luster is an expert in that area?

9 A. I don't know if he's an expert or not in that
10 area.

11 Q. Let's talk for a minute about Ann Kenny. She
12 was the person selected to replace Mr. Luster as the
13 401 coordinator; is that correct?

14 A. That's correct.

15 Q. And who made that selection?

16 A. Gordon White and Jeannie Summerhays, I
17 believe. That would be the program manager and section
18 manager for the shorelines and environmental assistance
19 program. She was a 401 coordinator in the region with
20 ample experience in complex and smaller projects,
21 trained in part by Tom Luster. We had regionalized the
22 function. In fact, I had hired her into that position
23 earlier, the 401 coordination position in the region,
24 and so she was more than qualified to assume the role.

25 Q. And do you know what her undergraduate degree

1 is in?

2 A. Let me start with her -- I believe she has a
3 graduate degree in public administration. I'm not
4 recalling right off the bat what her undergraduate
5 degree is in.

6 Q. Is she a member of the Society of Wetland
7 Scientists?

8 A. I don't believe she is.

9 Q. And isn't it true that the main qualification
10 that you rely on to consider her -- well, do you
11 consider her an expert?

12 A. Again, it depends on with respect to what.
13 If it's with respect to being able to coordinate with
14 technical experts in a program for purposes of putting
15 together a 401 decision recommendation, I'd say she's
16 an expert.

17 Q. So the difference if I can summarize it
18 between Ann Kenny and Tom Luster, then, was that Ann
19 Kenny was put in the position to coordinate but not to
20 give particular technical opinions on technical issues;
21 is that correct?

22 MS. MARCHIORO: Objection. Your question
23 asked for a difference, and you only gave one of the
24 parts of the equation.

25 MR. EGLICK: Well, the other part of the

1 equation I thought he understood, which is whereas Tom
2 Luster at least thought he was supposed to offer his
3 technical expertise as well.

4 MS. MARCHIORO: Objection; lack of foundation
5 as to what Mr. Luster thought.

6 Q. (BY MR. EGLICK) Let me ask another question.
7 That's fine. Let's strike that. The problem that
8 you're describing, if problem it be, with Mr. Luster is
9 that on some issues somebody thought that he should
10 have acceded or receded to other people's opinions; is
11 that correct?

12 A. My understanding of the role that Tom should
13 have assumed would be that of one consulting with the
14 experts in the programs on the water quality and
15 wetland-related issues; that it's good and appropriate
16 for him to first have background in those technical
17 areas so that he can ask questions of the experts to
18 get the information he would need to be able to make a
19 determination with respect to reasonable assurance, and
20 given that he had that expertise, I would assume that
21 should have worked to his benefit.

22 However, it's also my understanding of the
23 role of the 401 coordinator that if there's a debate on
24 a technical issue that ultimately after asking
25 questions and doing the inquiring and doing the

1 coordinating and consulting, the expert in the progr.
2 -- the conclusion of the expert in the program should
3 prevail and should be represented in the decision
4 that's formulated.

5 Q. So Mr. Luster, you understood, should have
6 been making recommendations based ultimately on other
7 experts' opinions and not on his opinion; is that
8 correct?

9 A. The way his job was defined as I remember it,
10 the expertise he should have been exercising as a
11 priority would be his expertise as one who puts
12 together and writes the 401 document.

13 Q. Well, he was supposed to make a
14 recommendation, wasn't he?

15 A. That's correct.

16 Q. And you're testifying here, aren't you, that
17 in the end if -- let's pick somebody -- Kevin
18 Fitzpatrick had a different view of the evidence than
19 Tom Luster did that Tom Luster's recommendation that he
20 was supposed to make should have reflected Kevin
21 Fitzpatrick's view, not Tom Luster's view; isn't that
22 correct?

23 A. Yes.

24 Q. So if Tom Luster then sat down and looked at
25 the public comments from experts outside of DOE and

1 looked at the port material and then looked at the
2 material from ecology analysis and decided that, for
3 example, the public comments had the better of the
4 argument but Kevin Fitzpatrick disagreed, then Tom
5 Luster was supposed to write his recommendation to
6 reflect Kevin Fitzpatrick's view; is that correct?

7 A. Not necessarily. I think that's an
8 oversimplification of the types of situations that
9 develop. I think that what would typically happen in a
10 situation like that for a major complex project is that
11 I would hear from the 401 coordinator of the concerns
12 if I were the management lead, for example, involved
13 with the project and would assist in making sure that
14 an appropriate debate was carried out to the point
15 where I was comfortable and that others would be
16 comfortable too that we would have reasonable
17 assurance.

18 So there could be situations where it would
19 be more complicated than just Tom Luster saying, okay,
20 I can't ask questions anymore because you're the
21 technical expert. If he had significant concerns, then
22 those would be discussed further. I can think of
23 occasions where that happened.

24 Q. And at the end of the day, if Tom Luster
25 wasn't satisfied that his concerns had been addressed,

1 it's your testimony that he wasn't free to write a
2 recommendation that reflected those concerns as opposed
3 to the view of some other person in the department who
4 you view as more expert; is that correct?

5 A. It would be difficult for me to support a
6 process where if I knew when we ended up in court if we
7 did that the technical experts from our water quality
8 program or the shorelines and environmental assistance
9 program could not support a decision written up by a
10 401 coordinator that didn't represent their expertise.

11 Q. Now, who was the final arbiter in ecology for
12 the recommended 401 that was presented to Gordon White
13 for signature? Who made the final decision as to what
14 would go into it in the final analysis?

15 A. Well, Ann Kenny wrote the 401, and prior to
16 calling it final, technical people reviewed it,
17 management people reviewed it, and a final version was
18 agreed upon.

19 Q. And who made the final decision to forward
20 that to Gordon White and say this is the one we want
21 you to sign?

22 A. I believe -- my recollection is that Ann
23 Kenny, in coordination with our consultants, our
24 experts at King County, and with Shannon & Wilson and
25 our internal experts wrote a 401 that when it was

1 complete, when she had input from all the appropriate
2 experts, then it was her job to provide that to the
3 decision maker, who was Gordon White.

4 Q. And that didn't go through you?

5 A. I had opportunities to review the draft 401.

6 Q. Didn't you make the final decision of what
7 went to Gordon White?

8 A. The process wasn't really that
9 straightforward.

10 Q. So Ann Kenny sent her draft 401 to Gordon
11 White without your reviewing it first?

12 A. I reviewed it. Our attorneys reviewed it.
13 Technical staff reviewed it. Once everyone had had the
14 review, if a concern didn't emerge that required a
15 revision, then it was time for Gordon White to see it.

16 Q. And who was Ann Kenny's boss?

17 A. Jeannie Summerhays.

18 Q. And who is her boss?

19 A. Gordon White.

20 Q. So you had no input into what went to Gordon
21 White?

22 A. Oh, I had input. I read it as did others.

23 Q. Did you ever make a comment at some point
24 that Tom Luster was not working for the Department of
25 Ecology while he was still working for ecology?

1 A. Well, if I did, it was a mistake.

2 Q. What do you mean it was a mistake? Did you
3 make such a comment?

4 A. I don't recall that. If he was working for
5 Department of Ecology, I can't think of a reason why I
6 would suggest he wasn't working for ecology.

7 Q. You can't think of any reason why you would
8 have said that?

9 A. I don't recall having any --

10 Q. Can you think of any reason why you might
11 have written that down?

12 A. No.

13 Q. Did you ever have any concern that Tom
14 Luster's concerns about the port application and how
15 ecology was handling it and what issues were being
16 raised was not towing the ecology line?

17 A. I wouldn't characterize it that way. For the
18 most part, I had a lot of confidence in Tom. At least
19 I did up until the point of -- I started having more
20 significant concerns about Tom in the fall of 2000, but
21 Tom had substantial influence on the decision-making
22 process up to the point where in September 2000 we made
23 it clear to the port that what they had in front of us
24 didn't give us reasonable assurance. Tom had
25 substantial influence over that in consulting and in

1 coordination with our technical people, and so -- I'm
2 forgetting the -- I'm losing track now of the specific
3 question.

4 Q. Well, why don't I ask another one. I think
5 you were getting way beyond the question actually. So
6 September 2000, a lot of confidence in Tom. October
7 2000, Tom taken off the project; is that correct?

8 A. While in September 2000 I had confidence in
9 Tom, it didn't mean I also wasn't having concerns from
10 time to time, but my concerns became significant in the
11 fall of 2000.

12 Q. Because he was not agreeing with the program
13 that had been laid out after the September meeting down
14 at the Port of Seattle; isn't that correct?

15 A. No. My concerns with Tom were cumulative,
16 including prior to September 2000 when I still did have
17 some confidence in his -- where he was coming from, but
18 that in working with technical staff to work through
19 issues, to resolve issues, he was not accepting what he
20 was hearing.

21 Q. And that was impeding progress on the
22 commitments that had been made to the port in September
23 2000, wasn't it?

24 A. It was impeding our ability to move forward,
25 period.

1 Paula Ehlers, his boss, Kevin Fitzpatrick, and Joan
2 Marchioro, and it's dealing with Sea-Tac, and he's
3 providing a copy of some what he calls somewhat drafty
4 notes used for a discussion the previous day on issues,
5 and he indicates he's realizing that -- did you want me
6 to read it?

7 Q. No. That's okay. So you've seen this
8 before, have you?

9 A. Yes.

10 Q. And this is an e-mail you received from Tom
11 in the course of business?

12 A. I'm sorry?

13 Q. This is an e-mail you received from Tom in
14 the course of business at ecology?

15 A. Yes.

16 Q. And he says in it, quote, I realize that mine
17 is apparently the minority opinion on what the port and
18 ecology need to do to meet 401 requirements, but I
19 think it would be helpful for you to have these for a
20 couple of reasons, end quote. Do you see that?

21 A. Yes.

22 Q. Then he goes on to caution that "while some
23 of them may be internally resolved through consensus
24 minus one" -- was the one a reference to him, I guess?

25 A. Yes.

1 Q. And didn't there come a time when actually
2 Tom was excluded from --

3 A. Irrespective of the commitments we made to
4 the port in September, it was impeding our ability to
5 move forward.

6 Q. Didn't there come a time when Tom was
7 actually excluded from a meeting with the port?

8 A. Prior to the reassignment?

9 Q. Yes.

10 A. That may have happened. I'm not recalling
11 specifically.

12 Q. Didn't Mic Dinsmore complain about Tom at
13 your meeting in September 2000?

14 A. I don't know if he -- I don't recall him
15 complaining about Tom specifically. I seem to recall
16 him complaining about staff who I would have inferred
17 would have meant Tom, but I don't remember if he called
18 him out by name or not.

19 Q. It was pretty obvious, wasn't it?

20 A. Yes.

21 (Deposition Exhibit No. 87 was marked for
22 identification.)

23 Q. (BY MR. EGLICK) Looking at what's been marked
24 as Exhibit 87 to your deposition. Can you identify it?

25 A. This is an e-mail from Tom Luster to myself,

1 Q. -- "we are likely to hear these or similar
2 issues raised during public review." Do you see that?

3 A. Yes.

4 Q. Now, there's some handwritten notes on the
5 copy I have. Do you see the handwritten notes?

6 A. Yes.

7 Q. That's your handwriting, isn't it?

8 A. Yes, it is.

9 Q. Now, look in the middle there. There's a
10 circle. Do you see that?

11 A. I see that.

12 Q. Is that your handwriting?

13 A. Yes, it is.

14 Q. Why don't you read that into the record.

15 A. It says, "Tom L is apparently not working for
16 ecology."

17 Q. Now, was there some confusion in your mind
18 about whether he had been fired?

19 A. My recollection of this particular document
20 is that it represents frustration I had with how Tom
21 was fulfilling his role as a 401 or not fulfilling his
22 role as a 401 coordinator.

23 Q. Well, when you're a 401 coordinator, aren't
24 you supposed to be working for clean water and the
25 water quality standards? Isn't that what you're

1 supposed to measure your performance against?
 2 A. Our goals are to make defensible decisions
 3 that protect the environment.
 4 Q. And are you saying that based on Tom writing
 5 this memo and saying, gee, I know I'm a minority but
 6 you got to hear these things because you're going to be
 7 hearing them later on, not working for ecology? Isn't
 8 that what you're saying here?
 9 A. No.
 10 Q. Well, did I read the words wrong or did you
 11 read them wrong into the record? Are there other words
 12 there other than the ones you read?
 13 A. I believe that I said these words represent
 14 my frustration with the way things were progressing or
 15 not progressing.
 16 Q. You were frustrated with Tom Luster because
 17 he had the temerity to write a memo and say, hey,
 18 there's some issues that haven't been resolved in my
 19 view; is that correct?
 20 A. My recollection of the situation is that the
 21 questions had been asked and answered and debated and
 22 discussed thoroughly. Tom had been given every
 23 opportunity to ask his questions and provide his input
 24 and to participate in the debate with my support and
 25 that in the end he would not accept what I believed to

1 be a reasonable approach put forth by the water quality
 2 program, the experts that in his role my understanding
 3 is he is supposed to defer to.
 4 Q. Who is more qualified, Mr. Hellwig, with
 5 regard to resolution of 401 issues? Who is more
 6 expert, Tom Luster or you? If you want, I can give you
 7 his resume to go over and we can go over yours.
 8 MS. MARCHIORO: Objection; argumentative.
 9 A. Please ask the question again.
 10 Q. (BY MR. EGLICK) Who is more qualified to
 11 resolve issues regarding a 401 water quality
 12 certification -- you understand that means compliance
 13 with the state water quality standards -- Tom Luster or
 14 you?
 15 A. I'm thinking.
 16 Q. Pardon me?
 17 A. I'm thinking.
 18 Q. Take as much time as you need.
 19 A. I'll answer it this way. For this particular
 20 situation at this stage of the decision-making process,
 21 I had concerns that Tom Luster was able to do his job.
 22 Q. Do you want me to repeat the question again,
 23 Mr. Hellwig?
 24 A. Go ahead.
 25 MR. EGLICK: Read back the question, please.

1 (The reporter read back as requested.)
 2 A. Tom Luster is trained in writing 401s and
 3 making recommendations with respect to reasonable
 4 assurance. I am not.
 5 Q. (BY MR. EGLICK) And he's educated in the
 6 science that's involved as well, isn't he?
 7 A. I believe he has some education in the
 8 science.
 9 Q. And you do not?
 10 A. I do not.
 11 MR. EGLICK: Let's take a break.
 12 (Recess taken.)
 13 Q. (BY MR. EGLICK) Looking, I guess, at Exhibit
 14 87 for a moment again, Mr. Hellwig. The date on that
 15 is October 18; is that correct?
 16 A. Yes.
 17 Q. So within how many days of this exhibit was
 18 Tom Luster removed from the port project?
 19 A. I don't recall specifically. I don't
 20 remember if it was a couple of weeks or -- I don't
 21 remember.
 22 Q. He was off by the end of October, wasn't he?
 23 A. Somewhere around then.
 24 Q. So it was less than two weeks, right?
 25 A. Well, if that's when it was, it would be less

1 than two weeks, yes.
 2 Q. Well, he wasn't on the project in November,
 3 was he, November 2000?
 4 A. I don't believe he was.
 5 Q. I'm sorry?
 6 A. I don't believe he was, no.
 7 Q. Now, Tom Luster was removed, and meanwhile
 8 ecology proceeded with the process of negotiating the
 9 401 permit; isn't that correct?
 10 A. I don't know if I'd characterize it as
 11 negotiating the 401 permit.
 12 Q. Well, you engaged in a regular series of
 13 negotiation meetings with the port, didn't you, to
 14 negotiate the terms of the 401 certification, didn't
 15 you?
 16 A. We arranged for technical meetings with the
 17 port, facilitated technical meetings with the port to
 18 work through issues. The purposes of the meetings were
 19 to keep us focused on documents the port would need to
 20 submit and document the process towards attempting to
 21 reach a resolution on those issues.
 22 Q. So these weren't permit negotiations?
 23 A. I wouldn't characterize them as permit
 24 negotiations.
 25 Q. Did anyone characterize them as permit

1 negotiations that you know of?
 2 A. Well, if they did, if I did looking back at
 3 what happened now --
 4 Q. What do you mean what happened now?
 5 A. Looking back at the situation a year or so
 6 later, I would not consider those meetings
 7 negotiations.
 8 Q. Well --
 9 A. I don't believe I ever considered them
 10 negotiations.
 11 Q. And if anyone had presumed, for example, on
 12 the port payroll to call them negotiations, what would
 13 you have done?
 14 MR. REAVIS: Objection; calls for
 15 speculation.
 16 Q. (BY MR. EGLICK) Go ahead and answer looking
 17 back now.
 18 A. I would have described the process that we
 19 had underway and not in the context of negotiating the
 20 permit. Our job was to make it clear for the port what
 21 would be required if they wanted us to be able to
 22 approve the application, which is a reasonable thing to
 23 do.
 24 It's reasonable for the port to expect from
 25 us clarity around what the requirements ought to be,

1 and the purpose of the technical meetings, the
 2 facilitated technical meetings, was to make it clear
 3 what the port needed to submit, set up time frames
 4 around it, and then document progress made.
 5 Q. So no way were these permit negotiations; is
 6 that right?
 7 A. No.
 8 Q. That's not right?
 9 A. They were not negotiations.
 10 Q. Who is Rachel McCrea?
 11 A. McCrea?
 12 Q. McCrea. Sorry. M-c-C-r-e-a.
 13 A. She worked for and probably still does for
 14 the firm of Floyd & Snider and reports to Kate Snider
 15 at that firm. Kate Snider was hired by the port after
 16 agreement with the port and ecology that there be
 17 facilitated meetings and having the resources to do so,
 18 to facilitate technical meetings, technical and
 19 management meetings with the port and ecology to work
 20 through stormwater management plan issues as well as
 21 low flow mitigation plan issues, and she as an
 22 assistant to Kate and a member of that firm would
 23 sometimes be the facilitator of those meetings. More
 24 frequently or more often than not, she was there with
 25 Kate to do the documentation.

1 Q. And who picked this firm Floyd & Snider?
 2 A. The firm was suggested by the port, and I
 3 don't recall if there was familiarity on the part of
 4 ecology -- oh, yes, there was. The firm -- the port
 5 suggested Kate Snider. Kate had worked with ecology on
 6 other matters, the Everett landfill. I believe I met
 7 her when she was facilitating meetings related to some
 8 issues around the Everett landfill. We had some
 9 familiarity with her, and the port suggested her as a
 10 facilitator. We agreed. The port said they would pay.
 11 So we set up the facilitated meeting process.
 12 Q. And did you ever review the contract with
 13 Floyd & Snider?
 14 A. No.
 15 Q. Do you know what the instructions were that
 16 the port gave to Floyd & Snider in their engagement
 17 contract?
 18 A. No.
 19 Q. Do you know how the port described the
 20 process to Floyd & Snider?
 21 A. Well, we had discussions with Floyd & Snider
 22 with the port and ecology present at the same time
 23 about expectations from the or out of the facilitated
 24 meeting process, but I don't know the contents of any
 25 meetings that might have happened between Floyd &

1 Snider and the port without ecology.
 2 Q. So if Floyd & Snider gained an understanding
 3 of what this process was about, they gained it not just
 4 from the port but from ecology as well?
 5 A. Yes.
 6 Q. So they were very clear from ecology as to
 7 what these meetings were about?
 8 A. If we had questions about clarity, if there
 9 was a perception that there wasn't clarity about the
 10 process and the role of the facilitator, then we would
 11 discuss it.
 12 Q. I mean, going into it, I mean, going into the
 13 process from the outset, ecology participated with the
 14 port in telling Floyd & Snider this is what this
 15 process is, correct?
 16 A. Yes.
 17 Q. And one of the reasons that you did that
 18 presumably was if you look back at Exhibit 86 -- that's
 19 that memo about lessons learned from big projects. Do
 20 you remember that one?
 21 A. Yes.
 22 Q. Ecology presumably had a concern to make sure
 23 that no one misunderstood what the process was going *
 24 be; is that correct? That's one of the lessons --
 25 A. That's correct.

1 (Deposition Exhibit No. 88 was marked for
 2 identification.)
 3 Q. (BY MR. EGLICK) Showing you what's been
 4 marked as Exhibit 88. Can you identify it?
 5 A. There's two e-mails here. One is from -- the
 6 top is from Ann Kenny to Rachel McCrea. It's dated
 7 October 24. It has to do with third runway permit
 8 negotiations is how it's termed here by Ann.
 9 Q. Ann who?
 10 A. Ann Kenny.
 11 Q. And she works for ecology, right?
 12 A. Right.
 13 Q. She took Tom Luster's place; isn't that
 14 right?
 15 A. Right. Yes.
 16 Q. You've seen these e-mails before, haven't
 17 you?
 18 A. Yes.
 19 Q. And the description from Rachel McCrea to Ann
 20 Kenny and to you is also "Subject: Third Runway 401
 21 Permit Negotiations," isn't it?
 22 A. Yes.
 23 Q. And in the text of the McCrea to Kenny cc to
 24 Snider and Hellwig e-mail, it refers to this
 25 negotiation process and to, quote, each 401 permit

1 negotiation, quote. Do you see that?
 2 A. Yes.
 3 Q. I want you to take a look at -- by the way,
 4 let's hold on 88 for a minute. We're at October 24,
 5 2000, right, on this Exhibit 88?
 6 A. Correct.
 7 Q. And looking back at Exhibit 87, that was
 8 October 18, 2000; is that right?
 9 A. That's correct.
 10 Q. That's the one that has that statement on it
 11 from you, "Tom L is apparently not working for
 12 ecology," referring to Tom Luster?
 13 A. Right.
 14 Q. So by October 24, which by my count is six
 15 days later, Rachel McCrea is telling Ann Kenny, quote,
 16 I understand from Ray Hellwig that you will be
 17 replacing Tom Luster in the 401 permit negotiations
 18 with the Port of Seattle, end quote.
 19 A. That's right.
 20 Q. So you were the one who on October 24
 21 informed Floyd & Snider that Tom Luster was being
 22 replaced by Ann Kenny?
 23 A. I did after that decision was made by Gordon
 24 White.
 25 Q. So that was six days after your October 18 --

1 that October 18 memo, which is Exhibit 87?
 2 A. It's within that time frame you and I
 3 discussed just a little while ago.
 4 Q. Now, when you sent that notice -- and I
 5 assume somehow between the 18th and the 24th you sent
 6 notice to Ms. McCrea, right, that Tom was being
 7 replaced by Ann? Do you know who I mean by Tom, Tom
 8 Luster and Ann Kenny?
 9 A. I'm sorry. You said I sent a message?
 10 Q. Well, apparently you did, because McCrea
 11 says, "I understand from Ray Hellwig," so what I'm
 12 asking you is that must have occurred sometime between
 13 October 18 and October 24; is that correct?
 14 A. That's correct. I don't remember speaking
 15 with Rachel directly or if I had talked to Kate Snider
 16 or what.
 17 Q. Now, when was Tom told to your knowledge that
 18 he was being removed? We've got this e-mail from him
 19 on the 18th, and it doesn't indicate any knowledge of
 20 that, so do you have any idea when he was told he was
 21 off the case?
 22 A. I don't have information on the exact time.
 23 I don't recall the exact time he was notified.
 24 Q. When were you notified?
 25 A. Well, it had to have been right in this time

1 frame here within these few days. I would have been
 2 notified by Gordon White and/or Paula Ehlers.
 3 Q. That Tom Luster was no longer working for
 4 ecology on the 401 certification for the airport; is
 5 that correct?
 6 A. That's correct.
 7 (Deposition Exhibit No. 89 was marked for
 8 identification.)
 9 Q. (BY MR. EGLICK) Looking at what's been marked
 10 as Exhibit 89 to your deposition. Can you identify
 11 what's been marked as Exhibit 89 to your deposition?
 12 A. This is an e-mail from Ray Hellwig to Ann
 13 Kenny, from myself to Ann Kenny dated October 26
 14 regarding third runway notes and next meetings, and it
 15 has attached to it -- well, it has the notes attached,
 16 and then beneath that is an e-mail from Tom Luster to
 17 myself and Kevin and Eric and Joan Marchioro. Subject
 18 is third runway notes and next meetings.
 19 Q. So you've seen these before, haven't you?
 20 A. Yes.
 21 Q. They're from ecology's records?
 22 A. Yes.
 23 Q. Now, Tom refers to a 10-20 meeting, and then
 24 you forward this on to Ann. I'm sorry. I keep on
 25 saying Tom and Ann because obviously I feel like I know

1 these people having worked with them. Do you
 2 understand who I mean when I say Tom and Ann?
 3 A. Tom Luster and Ann Kenny.
 4 Q. If you're ever confused, let me know.
 5 Obviously we've been corresponding for a few years. So
 6 Tom Luster refers to a 10-20 meeting. Do you see that?
 7 A. Yes.
 8 Q. Was that one of these what Rachel McCrea
 9 called permit negotiations?
 10 A. What Rachel McCrea referred to as permit
 11 negotiations, yes.
 12 Q. And was that the first one?
 13 A. Let me think here. I'm sorry. Did you say
 14 was that the first one?
 15 Q. Yeah. Or was that the second?
 16 A. I believe it was the second.
 17 Q. Why don't you look on the second page. That
 18 might help you. Look at the bottom.
 19 A. If I look at the second page here, "greetings
 20 all," this is from Rachel McCrea. She's now referring
 21 to it as third runway notes and next meetings and not
 22 negotiations, and she indicates, "Greetings all. The
 23 draft 10-20 notes and final 10-13 notes are attached.
 24 Please forward your comments/edits." Of course, that
 25 was to try to achieve accuracy with respect to our

1 different recollections of what happened at a meeting
 2 so then she could do final notes, so there was
 3 apparently the 10-13 meeting.
 4 Q. So there was the first of these what Rachel
 5 McCrea at least is calling permit negotiations was on
 6 October 13; is that correct?
 7 A. Yes. And then apparently she changed her
 8 reference to them.
 9 Q. And Tom Luster attended that first 10-13
 10 meeting, didn't he?
 11 A. That's my recollection.
 12 Q. And after that 10-13 meeting, on October 17
 13 there was an internal ecology meeting; is that correct?
 14 A. Let me look back here. Yes. Yes.
 15 Q. And then after that internal ecology meeting
 16 on October 17, then Tom Luster sent you his e-mail and
 17 his minority opinion memo on October 18; is that
 18 correct?
 19 A. Yes.
 20 Q. And that's Exhibit 87 if you recall.
 21 A. I'm looking at that, yes.
 22 Q. And then on October 23, Tom Luster sends an
 23 e-mail, and that's Exhibit 89, right?
 24 A. Yes.
 25 Q. It says, "Even though I was not at the 10-20

1 meeting." That was the meeting at the port, right, the
 2 second permit negotiation meeting as Rachel McCrea
 3 called them; is that right?
 4 A. Yes.
 5 Q. And he says even though I wasn't at that
 6 meeting, the meeting draft notes, quote, do not reflect
 7 those discussions and agreements and unless the notes
 8 are changed may end up being used to justify issuance
 9 of a 401 that does not meet 401 requirements, end
 10 quote. Do you see where it says that in Exhibit 89?
 11 A. Yes.
 12 Q. And he sent that E-mail on October 23, right?
 13 A. That's what it says.
 14 Q. So by October 23, he'd already been removed,
 15 hadn't he?
 16 A. I'm not sure when he was notified by his
 17 supervisors that his assignments had changed.
 18 Q. Look at the next paragraph that says "since I
 19 wasn't at the meeting."
 20 A. I don't know that he wasn't at the meeting
 21 because he'd already been reassigned or notified that
 22 he'd hadn't been reassigned.
 23 Q. Why don't you read the first clause up to the
 24 comma in the second paragraph in Tom's e-mail. It
 25 starts with the word "since."

1 A. "Since I wasn't at the meeting and since I
 2 am" -- okay. I'm sorry. I wasn't reading the right
 3 place. "Since I wasn't at the meeting and since I am
 4 being transitioned away from Sea-Tac review." Okay.
 5 Q. So by the 23rd he'd been removed, the
 6 chronology being first meeting with the port, Tom then
 7 writes his e-mail and memo after the internal ecology
 8 meeting on the 17th, and then by the 23rd he's been
 9 removed, correct?
 10 A. He's been reassigned, yes.
 11 Q. Removed from responsibility for the Sea-Tac
 12 project; is that correct?
 13 A. That's correct.
 14 (Deposition Exhibit No. 90 was marked for
 15 identification.)
 16 Q. (BY MR. EGLICK) Looking at what's been marked
 17 as Exhibit 90 to your deposition. Can you identify it?
 18 A. This is from Joan Marchioro to me, and it's
 19 new method A soil cleanup levels, and the note from
 20 Joan says, "This is not to be produced as deliberative
 21 but needs to be identified in the list to ACC and any
 22 other public disclosure requesters," and it has
 23 attached to it something forwarded by Chung Yee to h
 24 and something underneath that.
 25 The string is from -- it was from Pete Knet

1 to Chung Yee and Kevin Fitzpatrick, and that message
2 new method A soil clean-up levels starts, "Here are a
3 series of tables showing the calculations for the new
4 Method A soil cleanup levels and providing a comparison
5 to the current Method A values," and then there's an
6 attachment and more verbiage.

7 Q. Now, this is something that you saw
8 contemporaneous with its transmittal or approximately,
9 then?

10 A. Yes.

11 Q. Now, Pete Kmet again is an engineer in the
12 toxics program; is that correct?

13 A. Yes. Toxics clean-up program.

14 Q. Do you see where Mr. Kmet says, quote, we
15 believe the current standards are not protective for
16 several chemicals, end quote?

17 A. Yes.

18 Q. What's that referring to? Do you know?

19 A. The current method A MTCA clean-up criteria.

20 Q. And then take a look at the next paragraph.
21 You see it's referring to arsenic? Do you see that?

22 A. Yes.

23 Q. And he suggests that the background in
24 uncontaminated areas for arsenic is 7 PPM. Do you know
25 what 7 PPM is?

1 A. Parts per million.

2 Q. Now, is that the criterion for arsenic
3 incorporated in the 401 that ecology issued if you
4 know?

5 A. I would have to look.

6 Q. You don't know?

7 A. I don't have the 401 memorized, no.

8 Q. Do you have your copy there? I think I
9 handed them out before. I don't know whether you've
10 got one.

11 A. I believe that you -- yes.

12 Q. Take a look at the September one.

13 A. What page is that?

14 Q. Try condition E. I'm not sure which page
15 it's on.

16 A. I've got fill criteria on page 16.

17 Q. Try 17. I don't want to lead you. I'll let
18 your counsel tell if you she would, but I think it's
19 page 17.

20 A. I got it.

21 Q. You see the table there that says milligrams
22 per kilogram squared, and do you know whether that's
23 the same as parts per million?

24 A. I don't.

25 Q. You don't?

1 A. No.

2 Q. Well, let's assume that it is for a moment.

3 A. Okay.

4 Q. If I'm wrong, I'm sure somebody will point it
5 out to me. What's the value in the table here?

6 A. 20.

7 Q. How did you decide to go with 20?

8 MS. MARCHIORO: Objection. There's no
9 foundation that Mr. Hellwig decided anything with
10 respect to the clean fill criteria.

11 MR. EGLICK: I guess I was asking him how
12 ecology decided to go with 20, and since he's been so
13 intimately involved in the process, I thought he might
14 know.

15 Q. (BY MR. EGLICK) Let me ask you that,
16 Mr. Hellwig. Was there some decision made with regard
17 to the fill criteria that you wouldn't have been
18 involved in?

19 A. I wasn't involved in every single technical
20 decision. I did defer heavily to the technical people,
21 the experts making the recommendations on all the
22 technical issues.

23 Q. Were you involved in getting those
24 recommendations and deciding whether or not to accept
25 them?

1 A. I remember discussions, but I don't remember
2 them specifically. I remember some discussions around
3 the clean fill criteria with respect to background,
4 with respect to what would be protective of
5 groundwater. But I remember it generally. I don't
6 remember it specifically.

7 Q. So you're not able to testify as to what the
8 rationale was for going with a different value than the
9 value referred to in this Exhibit 90 for arsenic, are
10 you?

11 A. I'm looking over the materials, and I've
12 forgotten your question now.

13 MR. EGLICK: Why don't you read back the
14 question, please.

15 (The reporter read back as requested.)

16 A. Not right now.

17 Q. (BY MR. EGLICK) Now, when you sent this draft
18 401 that Ann Kenny worked on and you reviewed up to
19 Gordon White --

20 MS. MARCHIORO: Objection; mischaracterizes
21 the testimony of the witness. He did not send the 401
22 to Gordon White. I think the reporter can find that
23 question and find the correct answer.

24 MR. EGLICK: Well, the proper objection is
25 not testimony by counsel.

1 Q. (BY MR. EGLICK) Mr. Hellwig, did you have any
2 involvement in sending the recommended 401 decision up
3 to Gordon White for signature?

4 A. I'm trying to recollect the series of events.
5 It could be at the point where Gordon got a copy of the
6 draft that included this information. He might have
7 been receiving the draft at the same time I was. I'm
8 not recalling specifically the sequence of events as
9 far as how the information was developed and exchanged
10 and shared internally.

11 Q. You were the point person on this, weren't
12 you?

13 A. I was the management lead for purposes of
14 driving the process, making sure people were talking to
15 each other, making sure they were working through and
16 resolving issues and that that 401 would be written.

17 Q. Weren't you also the lead in terms of
18 justifying and assuring ecology management above your
19 level that there was reasonable assurance to issue this
20 401?

21 A. I had every confidence that in conversations
22 that would happen subsequent to this that we would go
23 over the issues and that any concerns that other
24 managers might have would be identified and discussed
25 to everyone's satisfaction and that we wouldn't make a

1 decision regarding reasonable assurance and that Gordon
2 wouldn't do that until he was comfortable with that
3 recommendation.

4 MR. EGLICK: Could you read back the
5 question, please?

6 (The reporter read back as requested.)

7 A. I had lead in organizing meetings to make
8 sure that issues were discussed.

9 Q. (BY MR. EGLICK) Please answer the question,
10 Mr. Hellwig, and if the answer is no, you can say no.
11 If the answer is yes, you can say yes. Otherwise I'll
12 just have the reporter read back the question again.

13 THE WITNESS: Why don't you read the question
14 again.

15 (The reporter read back as requested.)

16 A. No.

17 Q. (BY MR. EGLICK) Who prepared the briefing
18 memo for the director on the 401 decision?

19 A. Do you have that document?

20 Q. Mr. Hellwig, I'm asking the questions here.
21 Do you know?

22 A. I'm not recalling the briefing document. I'm
23 not recalling the briefing document that went with the
24 401.

25 Q. So it's your testimony you can't recall

1 preparing a briefing memorandum for the director on the
2 401 recommendation?

3 A. I prepared -- okay. I was thinking about
4 another chain of documents and events. Yes. I
5 prepared briefing documents on the 401 decision. I
6 prepared briefing documents for the director and for
7 presentations to the senior management team. I
8 prepared briefing documents for other meetings with
9 managers over time.

10 Q. I appreciate that, but the question I asked
11 you was whether you prepared the briefing memorandum
12 for the director of your department on the 401
13 recommended decision.

14 A. I believe that I did.

15 Q. Gordon White didn't prepare it, did he?

16 A. No.

17 Q. And didn't that briefing document attempt to
18 justify and explain the recommendation for 401 approval
19 that had been reached?

20 A. Well, as with any briefing document, it
21 provides information that indicates whether or not it's
22 an appropriate decision.

23 Q. So is that a yes?

24 A. Well, I'm not sure that I understand what
25 your definition of justification would be in this case,

1 so that's why I rephrased my answer.

2 Q. Rationale.

3 A. Okay. Rationale.

4 Q. Reasons.

5 A. Reasons, yes.

6 Q. And as part of that, didn't you explain the
7 rationale for the fill criteria that had been adopted
8 in the 401 recommended decision?

9 A. I believe that there's a section on clean
10 fill or acceptable fill.

11 Q. So you were the person who spoke for the
12 levels below the director in explaining to the director
13 the recommendation for the 401 certification decision;
14 is that correct?

15 A. I wrote the briefing document, yes.

16 Q. Was there somebody else who wrote a briefing
17 document too?

18 A. It's possible that I had the briefing
19 document reviewed by other staff before I finalized it,
20 but I'm not recalling specifically if I did that or
21 not.

22 Q. Did anyone else write a briefing document?

23 A. Not that I recall.

24 Q. Having gone through all that information, are
25 you able to explain the rationale for the arsenic value

1 placed in the 401 certification fill criteria?
 2 A. If it's not in the briefing document, then
 3 I'm recollecting that we had conversations about what
 4 would be acceptable, but I'm not in a position right
 5 now to explain it, no.
 6 Q. What about have you read the PCHB decision on
 7 the stay?
 8 A. I went through it.
 9 Q. Did you see the discussion in the PCHB
 10 decision about petroleum-based contaminants?
 11 A. I did.
 12 Q. I don't want to misquote the PCHB, but would
 13 you agree there were words in the decision to the
 14 effect there is no natural background for
 15 petroleum-based contaminants in Puget Sound soils?
 16 A. Something to that effect.
 17 Q. Do you disagree with that?
 18 A. Not necessarily.
 19 Q. Well, I'm not asking you necessarily. I'm
 20 asking you -- you're here today. You're the northwest
 21 regional director of the Department of Ecology. Do you
 22 disagree with that concept that there's no natural
 23 occurring background level for petroleum in the Puget
 24 Sound region?
 25 A. No. I don't disagree with the concept.

1 Q. Is there any evidence you have that petroleum
 2 is naturally occurring in Puget Sound soils?
 3 A. No.
 4 Q. Can you explain the basis on which the 401
 5 certification allowed a level of so-called naturally
 6 occurring petroleum to be included or to be present in
 7 fill?
 8 A. No.
 9 Q. Is that something that you brought -- and by
 10 that I mean this issue of the petroleum naturally
 11 occurring or not -- did you bring that to the attention
 12 of the director when explaining the rationale for the
 13 401 certification?
 14 A. I don't recall doing that.
 15 (Deposition Exhibit No. 91 was marked for
 16 identification.)
 17 Q. (BY MR. EGLICK) Showing you what's been
 18 marked as Exhibit 91 to your deposition. Can you
 19 identify it, please?
 20 A. It's a fax to Ann Kenny from Oliva Yvonne.
 21 Q. And what's attached?
 22 A. It's a letter to Mic Dinsmore, Executive
 23 Director, Port of Seattle, from Tom Fitzsimmons, and
 24 it's not on letterhead, so I don't know if it's a draft
 25 or not. It's dated September 28, 2000.

1 Q. Is this the letter that came out of that
 2 meeting when Mic Dinsmore flew in from Europe and you
 3 all had to go down and meet in the port office to talk
 4 about the withdrawal?
 5 A. May I have a moment to look at it?
 6 Q. Sure.
 7 A. This is it, yes.
 8 Q. Now, was this letter -- the wording of this
 9 letter drafted at that meeting?
 10 A. I seem to recall that some of it was.
 11 Q. In other words, you actually sat down there
 12 with the governor's chief of staff and worked out the
 13 wording of a letter that would be sent; isn't that
 14 right?
 15 A. We discussed commitments that would be
 16 appropriate from there forward and came up with some
 17 draft language, yes.
 18 (Mr. Witek left the room.)
 19 Q. And this is once again the meeting that we
 20 discussed that Tom Luster was not present at even
 21 though at that point he was still the 401 coordinator
 22 and responsible for the third runway application; is
 23 that correct?
 24 A. That's correct.
 25 Q. Now, could you take a look back if you still

1 have it -- and if not, I can try and dig it up -- at
 2 Exhibit 86?
 3 A. Yeah. I got it.
 4 Q. Do you see on the second point there,
 5 "Managers should not reward project applicants'
 6 attempts to get early assurances"? Do you see that?
 7 A. Yes.
 8 Q. Do you see the sentence that says, quote,
 9 many project applicants will try to get ecology
 10 managers to assure them that a project is, single
 11 quote, permissible, single quote, end quote?
 12 A. I see that, yes.
 13 Q. Now, let's just take a look at this Exhibit
 14 91. If you look down in the third paragraph, there's a
 15 sentence there that starts with the words "we
 16 anticipate." Do you see that?
 17 A. I was still looking at the other document.
 18 Okay. I'm looking at the letter again. Which
 19 paragraph, please?
 20 Q. Third paragraph down. Do you see the
 21 sentence that says "we anticipate"?
 22 A. Yes. I see that.
 23 Q. Could you read that sentence into the record?
 24 A. "We anticipate that the Port will be able to
 25 adequately address remaining issues. In light of" --

1 Q. I asked you to read that sentence, but go
2 ahead. Why don't you read the next sentence after the
3 colon.

4 A. "In light of this perspective, we believe
5 that it is possible to issue a 401 Certification
6 consistent with the following."

7 Q. Now, your 401 coordinator's not there. He's
8 still assigned to the project, but he's not there. The
9 language of this letter is apparently being hammered
10 out in the room, and aren't you making those very kinds
11 of reassurances that the lessons learned memo says to
12 avoid?

13 A. Well, first of all, I don't agree straight up
14 with all the bullets in the lessons learned memo.

15 Q. So as far as you're concerned, some of those
16 just aren't good advice; is that correct?

17 A. I think that in some instances they're not
18 good advice. It depends on the circumstances. It
19 depends on the situation.

20 Q. Now, did you ever send your own memo around
21 and say, well, I don't think this applies to me or to
22 the northwest regional office or to the third runway
23 application?

24 A. The lessons learned document was a document
25 presented by staff for discussion purpose so we could

1 learn to improve the way we dealt with major projects,
2 and so it isn't agency policy. It wasn't adopted as a
3 doctrine. It was good input from staff for us to
4 consider when working major projects.

5 Q. And in answer to my question, you never sent
6 around any revisions or corrections or things that you
7 thought should be changed in this document, did you?
8 By this document, I mean the lessons learned memo.

9 A. Well, I know that pursuant to different
10 discussions that the agency's had other documents have
11 been produced, but I don't know if they were produced
12 in direct response to or for purposes of amending this
13 document.

14 (Deposition Exhibit No. 92 was marked for
15 identification.)

16 Q. (BY MR. EGLICK) Showing you what has been
17 marked as Exhibit 92 to your deposition. Can you
18 identify it?

19 A. Yes. It's to Gary Zeiler dated May 12, 2000.
20 That's a wrong date.

21 Q. In fact, if you look at the second page,
22 isn't this really from November 2001?

23 A. Yeah. I have a memo document on file, and I
24 assumed that the date function would update
25 automatically. In this particular case, it didn't. I

1 seem to recall that -- this is to Gary Zeiler from me.
2 It's staff recognition checks. I seem to recall Gary
3 calling me up and asking me to look at the date. I
4 believe I sent him a corrected version. I don't know
5 for sure. I may have sent him a corrected version.
6 Maybe we just checked it over the phone.

7 Q. Now, as I understand it from this memo, you
8 were holding a meeting on November 13 that you called a
9 decision debriefing meeting?

10 A. Yes.

11 Q. That's November 13, 2001?

12 A. That's correct.

13 Q. And was that an internal ecology meeting?

14 A. Yes.

15 Q. So nobody except from ecology was there; is
16 that correct?

17 A. Well, this was -- it would also include
18 friends or partners of individuals being recognized,
19 and it also included -- was to include our outside
20 consultants from King County and from Shannon & Wilson.

21 Q. Anyone from the port?

22 A. No.

23 Q. And this was for the purpose of presenting
24 checks to the staff persons who had worked on the 401
25 certification?

1 A. It was for a meeting where some people would
2 receive checks who had worked on the certification.
3 Other folks were invited to attend the meeting who were
4 being given letters of appreciation or certificates of
5 appreciation, so this was just for the individuals who
6 would be receiving a check.

7 Q. And the checks are something from ecology for
8 work performed on the 401 certifications?

9 A. That's correct.

10 Q. And did you pick the names who would get the
11 checks?

12 A. I picked out the names. I ran them by Tom
13 Fitzsimmons, and I believe that the e-mail where I did
14 that was disclosed. He sent back a message either on
15 the phone or through the e-mail concurring with the
16 names that I had here.

17 Q. Now, Pete Kmet worked on the 401 at some
18 point, didn't he?

19 A. As did dozens of other people.

20 Q. Pete Kmet wasn't on this list; is that right?

21 A. No, he's not. I believe that I had another
22 list of folks who received certificates of
23 appreciation, and I think I had Chung Yee on that. I
24 don't believe I had Pete Kmet.

25 Q. Now, these meetings that you were holding

1 with the port, in holding those meetings with the port,
2 you prepared matrices, didn't you, of where decision
3 issues were on the 401?

4 A. So we're jumping back to May 2000 now?

5 Q. No. Actually, we're jumping to starting in
6 October 2000 when the meetings with the port started.

7 A. Okay. The facilitated meetings. Right.
8 Yes.

9 Q. And those matrices were prepared and
10 distributed to whom?

11 A. All the individuals with responsibility for
12 working together to internally and then externally too
13 at the port to resolve issues and to Tom Fitzsimmons,
14 and I'm not remembering other managers at this point.

15 Q. So did those matrices get shared with the
16 port at these negotiation meetings?

17 A. Well, they weren't negotiation meetings. I
18 think in the very beginning I think that the port-hired
19 facilitator referred to the meetings as negotiations.
20 I think that they weren't referred to as negotiations
21 after the meetings got underway.

22 They were facilitated technical meetings to
23 work through issues related to the port's stormwater
24 management plan proposal and their low flow mitigations
25 plan, and since the meetings were facilitated on behalf

1 of ecology and the port, of course the port would get
2 copies of those notes too.

3 Q. Those matrices, are there kind of -- I don't
4 know what kind of computer program you do them on, but
5 they're kind of documents with lines going horizontally
6 and vertically and it talks about an issue and then
7 where the issue is in the process?

8 A. Right. Initially I thought you were
9 referring to some tables that I used to produce myself,
10 but, yeah, these tables or matrices if you will were
11 probably produced in Word.

12 Q. Those have boxes in them with notations on
13 various issues?

14 A. Yes.

15 Q. And those were shared with the port as part
16 of this facilitated process?

17 A. With the port and then of course ultimately
18 with ACC and anyone else who made a request to get a
19 copy.

20 Q. Now, what do you mean by ultimately?

21 A. They were made available through public
22 disclosure.

23 Q. Weren't they withheld as deliberative?

24 A. Not the -- the matrices that I'm recalling
25 that were produced to document the technical meetings

1 that were facilitated by Kate Snider, meetings between
2 the port and ecology, that information was not held.
3 That information was made available on a regular basis
4 to the ACC unless there's another matrix or a table
5 that you're referring to and I maybe have a different
6 one in mind. But I'm referring to the facilitated
7 technical meetings. All of that information was made
8 available.

9 Q. Let's see what we've got here.

10 (Deposition Exhibit No. 93 was marked for
11 identification.)

12 Q. (BY MR. EGLICK) Can you take a look at what's
13 been marked as Exhibit 93?

14 A. Yes.

15 Q. Is this the kind of matrix that you were
16 referring to?

17 A. No. No. This is -- I was referring to the
18 matrices or tables that were produced along with the
19 notes that documented the facilitated technical
20 meetings between the port and ecology. This is not the
21 table that I was referring to.

22 Q. Well, who produced the matrix in Exhibit 93?

23 A. This is one that I produced.

24 Q. And so who did this go to?

25 A. This went to Tom Fitzsimmons.

1 Q. And to anyone else?

2 A. Ann Kenny.

3 Q. Anyone else?

4 A. I don't think so.

5 Q. Well, I'm looking at your e-mail dated May
6 17. Do you see Exhibit 93? It says, "This, quote,
7 updated, quote, table should assist in discussions with
8 Port of Seattle staff and managers." Do you see that?

9 A. Yes.

10 Q. Now, who was it going to assist?

11 A. Let me look at it for a minute.

12 Q. Sure.

13 A. This was to assist us in our internal
14 discussions and subsequent discussions with the port in
15 understanding the relationship between the natural
16 resource mitigation plan, the low flow mitigation plan
17 requirements and the stormwater plan, the idea being
18 that there needed to be analysis relating to the
19 integration of them.

20 Q. So was this shared with the port?

21 A. Well, let me see. I don't believe it was.
22 It may have been at a later date after it was
23 ultimately released, but I believe its usefulness was
24 short-lived; that a point needed to be made with
25 respect to the need to have these plans integrate, and

1 after the point was made, after we discussed it, I
2 don't believe it was used much into the future.

3 (Deposition Exhibit No. 94 was marked for
4 identification.)

5 Q. (BY MR. EGLICK) Looking at what's been marked
6 Exhibit 94 to your deposition. Can you identify it?

7 A. This is an e-mail from Ann Kenny to myself.
8 It's dated July 29, 2001, last summer, to Kevin
9 Fitzpatrick, John Drabek, others at ecology. It was
10 at the time deliberative, and it was a preliminary
11 draft 401 water quality certification for the third
12 runway. It also went out to our consultants, Katie
13 Walter and Kelly Whiting.

14 MS. MARCHIORO: I'm going to interject. I
15 believe this is a previously marked exhibit for the
16 deposition of Ann Kenny.

17 MR. EGLICK: I don't know if it's the same
18 one. Maybe it is. We'll have a dup.

19 Q. (BY MR. EGLICK) So you got one of these,
20 right?

21 A. Right.

22 Q. And you commented on it to the extent you had
23 comments?

24 A. I believe I would have, yes.

25 Q. Do you see this cover note here where

1 Ms. Kenny says, quote, it is still very rough, but
2 given the time constraints ahead of us, I want to get
3 this to you so that you can start looking it over and
4 provide me with feedback, end quote?

5 A. Yes.

6 Q. This is an e-mail dated July 29.

7 A. Correct.

8 Q. So what's the time constraint if the deadline
9 -- what was the deadline for 401 certification based on
10 that one-year requirement? Wasn't it December 27,
11 2001?

12 A. It was a few months out.

13 Q. It was December, wasn't it?

14 A. I believe so.

15 Q. So here's Ms. Kenny sending an e-mail on
16 Sunday, July 29, saying given the time constraints
17 ahead of us, I wanted to get this to you. What time
18 constraint is she referring to?

19 A. She's referring to a block of time that we
20 estimated would be adequate for making a 401 decision.

21 Q. A block of time you estimated to whom?

22 A. Internally amongst ourselves.

23 Q. And was that estimate transmitted to someone
24 who was relying on it?

25 A. I believe that -- well, there was a lot of

1 interest in the status of the decision-making process
2 from the proponent and of course from the opponents,
3 and as part of my job in coordinating with the
4 technical people as I mentioned previously, I would ask
5 that estimates be made with regard to how long it would
6 take to review given documents and given their adequacy
7 to speculate around when we might be able to make a
8 decision, and the time frame that's being referred to
9 here or the time constraints relate to a time frame
10 produced by that process.

11 Q. Well, surely, Mr. Hellwig, you're not
12 testifying that the Airport Communities Coalition
13 placed a time constraint on ecology in which it wanted
14 a decision issued, are you?

15 A. No.

16 Q. And you understand, don't you, the definition
17 of the word "constraint," or should I bring in a
18 dictionary?

19 MS. MARCHIORO: Objection; argumentative.

20 A. I understand.

21 Q. (BY MR. EGLICK) Estimate is not a synonym for
22 constraint, is it?

23 A. Constraint doesn't necessarily imply an exact
24 date.

25 Q. I didn't ask you that. To your

1 understanding, is estimate a synonym for constraint?

2 A. Not to my understanding.

3 Q. So who's putting on the time constraint
4 referred to by Ann Kenny in this e-mail?

5 A. The agency imposed it upon itself to make a
6 decision.

7 Q. By when?

8 A. The block of time that we had in front of us
9 for making a decision moved several times, and so I'm
10 pausing because I'm trying to recollect what we'd
11 established for ourselves at this time. At one time it
12 was June. Then it was July, and now we're into August.
13 It would move as a function of us not getting what we
14 needed or having enough time to review what we had to
15 make a decision and be comfortable with it. So I'm not
16 recalling a deadline associated with this time
17 constraint right here.

18 Q. So Ann Kenny was working weekends and
19 referring to time constraints, but to your knowledge,
20 there really wasn't one?

21 A. We were attempting to make a decision in an
22 effective and efficient manner.

23 Q. Well, weren't you getting pressure from
24 higher-ups to get that certification out?

25 A. We had continuous pressure, and as you've

1 pointed it out me, I've indicated in previous documents
2 at times I thought it was substantial pressure to move
3 ahead with a decision, the pressure being interest from
4 the proponent and interest -- pressure came at us from
5 multiple directions.

6 Q. Let me go back and ask the question I asked
7 you before again to just make sure we're not getting
8 confused here. Are you testifying that there was
9 pressure from the Airport Communities Coalition to
10 issue the decision quickly?

11 A. No.

12 Q. And you're not testifying that there was
13 pressure from the Airport Communities Coalition to
14 issue a certification, are you?

15 A. No. Quite the contrary.

16 Q. So the pressure to issue a decision quickly
17 was coming from higher-ups in state government, wasn't
18 it? Wasn't it?

19 A. The interest in a quick decision had been
20 there for a matter of years on the part of the project
21 proponent.

22 Q. Please answer my question.

23 A. Please repeat the question.

24 Q. The pressure for a quick decision was coming
25 from higher-ups in state government, wasn't it?

1 A. No.

2 Q. No pressure from the governor's office?

3 A. Lots of interest from the governor's office
4 and on the part of agency management in the
5 decision-making process.

6 Q. Interest from the governor's office expressed
7 how?

8 A. Expressed in wanting to know what the status
9 of the decision was.

10 Q. And how did you hear that the governor's
11 office wanted to know what the status was?

12 A. Director Fitzsimmons in one instance would
13 have a conversation with the chief of staff --

14 Q. This Joe Dear person?

15 A. Paul Isaki.

16 Q. Joe Dear was gone by then?

17 A. Joe Dear was gone.

18 Q. Okay.

19 A. And I would provide updates or briefings.

20 Q. How many 401s have you worked on where Paul
21 Isaki is calling and asking when it's going to be out?

22 A. One.

23 Q. Sea-Tac, right?

24 A. Correct.

25 Q. Take a look if you would at page 10 of this

1 Exhibit 94. Look at the top of the page if you would.

2 A. Okay.

3 Q. Do you see where it says "basis"?

4 A. Yes.

5 Q. Now, that didn't show up -- that bold
6 paragraph of print basis there text didn't show up, did
7 it, in the August or September certifications, did it,
8 the ones that were actually issued?

9 A. I'm looking at that, and I don't see it.

10 Q. Now, could you read the first -- actually,
11 why don't you read the whole thing into the record,
12 that basis paragraph that's in Exhibit 94 which was the
13 draft that Ann Kenny circulated on July 29.

14 A. "Basis: The fill source sampling schedule is
15 as proposed by the Northwest Regional Office Water
16 Quality Program. The Toxics Cleanup Program has
17 provided guidance for the sampling of
18 petroleum-contaminated soil stockpiles (Publication
19 Number 91-30). The guidance recommended a much higher
20 sampling schedule than as proposed in the fill
21 criteria. For example, for a 200,000-cubic yard
22 stockpile, the Toxics Cleanup Program guidance
23 recommended a minimum number of 226 samples as compared
24 to six samples as proposed above. In the absence of
25 Ecology guidance for the sampling of borrow sites, the

1 fill source sampling schedule will be as proposed by
2 the Northwest Regional Office Water Quality Program."

3 Q. So can you explain as you're sitting here
4 today the rationale for going with the lesser number of
5 samples, six as opposed to the 226 recommended by the
6 toxics clean-up program?

7 A. The rationale is with the water quality
8 program and the 401 coordinator that I would rely upon.
9 I don't have rationale beyond that.

10 Q. Was cost a factor, cost for the port?

11 A. I'm pausing because cost had been brought up
12 as a factor by the port. I'm not recalling that it was
13 a factor in this decision.

14 Q. Wasn't there another draft of this decision
15 that actually called out that cost was a factor?

16 A. I'm not recalling it. There may be one.
17 (Deposition Exhibit No. 95 was marked for
18 identification.)

19 Q. (BY MR. EGLICK) Looking at what's been marked
20 as Exhibit 95 to your deposition. Can you identify it?
21 Can you identify it?

22 A. It's an e-mail from Tom Fitzsimmons to
23 myself, Sheryl Hutchison, our public information
24 manager in Lacey for the agency, and Dianne Pastore,
25 who is Tom Fitzsimmons' assistant, regarding Seattle

1 editorials by phone about the third runway decision and
2 Tom's schedule on August 9.

3 Q. So what's that all about?

4 A. It was in anticipation of -- let me look at
5 it briefly.

6 Q. Sure.

7 A. It had to do with the timing of announcing
8 our decision knowing that there was interest in the
9 media and by other parties that we wouldn't want to
10 announce a decision prior to making it.

11 Q. Well, this kind of sets some parameters,
12 doesn't it, in terms of what your time frame is for a
13 decision?

14 A. It does.

15 Q. What's an E-Board by the way?

16 A. Editorial board.

17 Q. So part of the decision making was then
18 immediately or part of the discussion about decision
19 making was immediately trying to explain it to people
20 who write editorials for newspapers?

21 A. We knew that we'd be contacted. Now that I'm
22 seeing this and I'm thinking about my earlier answers,
23 I am recalling that as we got to the end we did project
24 what week we thought we would be able to make a
25 decision.

1 Q. And what week was that?

2 A. It was the week of August 10 or August 9.

3 Q. So all of this scheduling was done around
4 that constraint?

5 A. When we got to within a couple of weeks of
6 early August, it became much clearer when we thought we
7 could get a decision out, so we committed to making a
8 decision and trying to do it, and now I'm recalling
9 that's probably why Ann was needing to work on the
10 weekend, although she did that on her own.

11 MS. MARCHIORO: Can we take a break?

12 MR. EGLICK: Sure.

13 (Recess taken.)

14 (Ms. Leavitt left the proceedings.)

15 Q. (BY MR. EGLICK) What's SMT mean, Mr. Hellwig?

16 A. Senior management team.

17 Q. And what does that refer to?

18 A. Well, senior management team consists of the
19 following executive managers: the director, the deputy
20 director, the regional directors, chief financial
21 officer, director of personnel, and the legislative
22 liaison or intergovernmental affairs director, and our
23 division chief for the AAG sits in. The director's
24 assistant and special assistant to the director will be
25 there off and on. At the time it was Joe Williams, I

1 believe. Keith Phillips, special assistant to director
2 on water resource issues, used to be program manager
3 for water resources program.

4 Q. Are there votes taken at senior management
5 team meetings? Is that how it works?

6 A. No.

7 Q. So it's just discussion?

8 A. We have discussion, try to reach consensus on
9 important issues.

10 Q. On the water rights issue -- do you know what
11 I'm referring to when I say the water rights issue?

12 A. Yes.

13 Q. What's your understanding of what I'm
14 referring to?

15 A. It's my understanding you're most likely
16 referring to the issue related to whether or not the
17 port should be required to obtain a water right for the
18 stormwater that it manages to protect water quality.

19 Q. And the management of the stormwater as you
20 put it includes relying on that stormwater for
21 mitigation in perpetuity for stream flows; is that
22 correct?

23 A. To rely on that stormwater to -- well, to
24 manage it, to protect against problems associated with
25 peak flows, and to then also use it to mimic the

1 natural hydrologic cycle in perpetuity.

2 Q. Did the senior management team discuss the
3 water right issue?

4 A. Yes.

5 Q. Was everyone at the senior management team
6 unanimously in agreement that no water rights should be
7 required to the port?

8 A. I don't recall touching base with every
9 member on the team with regard to whether or not they
10 agreed with the approach or the decision.

11 Q. Well, the decision was discussed, wasn't it?

12 A. Yes.

13 Q. At the senior management team meeting on
14 what, April 3, 2001?

15 A. I would have to check my calendar.

16 Q. Was it sometime in the spring of 2001?

17 A. I believe so.

18 Q. And you don't recall whether anyone at the
19 meeting said, no, they need a water right?

20 A. I touched base with a couple of the members
21 prior to the meeting and don't recall that, and then
22 during the meeting, our AAG support had provided
23 information that could be used to -- well, informati-
24 on both sides of the issue for us to consider.

25 Q. Who provided information on both sides of the

1 issue?
 2 A. In consultation with program managers and
 3 other program staff and with assistance from the
 4 attorneys, we got help in understanding the issues on
 5 both sides -- or the elements of the debate on each
 6 side of the issue.
 7 Q. And then who made the decision not to require
 8 a water right?
 9 A. Senior management team.
 10 Q. Any particular way that that decision by the
 11 senior management team was accomplished? Was there a
 12 vote taken?
 13 A. Well, it wasn't a vote, but we asked for --
 14 essentially the question was posed and asked for
 15 concurrence, and the heads nodded. Tom's head nodded,
 16 which is the most important one in the room.
 17 Q. Tom who?
 18 A. Tom Fitzsimmons as the director.
 19 Q. He was at the meeting?
 20 A. He was at the meeting.
 21 Q. Did he disclose that he'd had a conference
 22 call on the water rights topic among other things with
 23 Joan Marchioro and Jay Manning in the few days leading
 24 up to the senior management team meeting?
 25 A. I don't recall if he disclosed that or not.

1 A. No.
 2 Q. Did Mr. Manning's participation in the
 3 Washington Environmental Council have any relevance in
 4 your mind --
 5 A. I think I was sorting it out in my mind to
 6 answer the question.
 7 Q. So who did he represent and who does he
 8 represent, then?
 9 A. The port.
 10 Q. Now, you don't remember, then, the director
 11 saying, well, I was on the phone with Jay Manning about
 12 that when you were deciding this issue with the senior
 13 management team, do you?
 14 A. I'm not remembering that.
 15 Q. Well, did you ever learn afterward that Jay
 16 Manning had been on a conference call with Joan
 17 Marchioro and the director?
 18 A. I remember hearing references to such
 19 conversation, but I'm not remembering it specifically.
 20 (Deposition Exhibit No. 96 was marked for
 21 identification.)
 22 Q. (BY MR. EGLICK) Looking at what's been marked
 23 Exhibit 96. Can you identify it?
 24 A. This is an e-mail from Dianne Pastore to
 25 myself and Curt Hart, who was my public information

1 Q. Do you know who Jay Manning is?
 2 A. Yes.
 3 Q. Who is he?
 4 A. Well, he works for private practice now, but
 5 he was division lead for the ecology division AAG's
 6 supporting ecology for a few years.
 7 Q. Lead meaning he supervised all the ecology
 8 attorneys representing ecology in advising ecology?
 9 A. Right. That's correct.
 10 Q. And he was and is now, is he not, an attorney
 11 for Port of Seattle?
 12 A. I believe that he's wearing a lot of hats
 13 right now. He supports the Washington Environmental
 14 Council and I believe a private firm. He belongs to a
 15 private firm and then also has provided support to the
 16 Port of Seattle as well.
 17 Q. So when you say he supports the Washington
 18 Environmental Council, do you mean with regard to the
 19 third runway application?
 20 A. No. No. He's just a member of the council.
 21 Q. So why are we having in a response to a
 22 question about whether he represented the Port of
 23 Seattle inclusion of a reference to the Washington
 24 Environmental Council? Is there some connection in
 25 your mind?

1 manager in the region, with copies to Tom Fitzsimmons
 2 and Sheryl Hutchison regarding briefing material for
 3 the governor, and it's a request that briefing
 4 materials being prepared for Tom's meeting with the
 5 governor and Paul Isaki on the third runway be sent to
 6 him close of business on Tuesday, August 7.
 7 Q. So is this one of those constraints that Ann
 8 Kenny was referring to?
 9 A. Yeah. I think I mentioned earlier that once
 10 the materials got in front of me I'd begin to recall
 11 that we had -- as we got close to the beginning of
 12 August that we set a goal for trying to make a decision
 13 if all the pieces would fall together in the week of
 14 the 10th.
 15 Q. And when you say you set a goal, set a goal
 16 and communicated it to whom?
 17 A. To Ms. Kenny and any other staff who would
 18 need to be assisting her with input for the 401.
 19 Q. Was the as you put it goal communicated to
 20 the port?
 21 A. I believe that I had at least one
 22 conversation with Elizabeth Leavitt a week to a week
 23 and a half in advance of the week of the 10th telling
 24 her that we might be able to make a decision that week.
 25 I said we were trying to make a decision. I was less

1 definite externally than I was internally.

2 Q. What do you mean by less definite?

3 A. I was deliberately vague with the port to
4 help manage expectations around what we might or might
5 not be able to do.

6 Q. You never did get that complete low flow plan
7 you were waiting for by the time you issued the 401
8 certification in August, did you?

9 A. We had enough information to make a decision.

10 Q. Did you have a complete low flow plan?

11 A. We had a calculated impact and we had
12 conceptual plans, and so we had what we needed to be
13 able to make a decision.

14 Q. Is that what you had told the port originally
15 that you needed to have to make a decision?

16 A. I believe that we had been telling the port
17 for months that we would not make a decision on the 401
18 until we had confidence in a calculated impact to the
19 creeks that would need to be offset.

20 (Deposition Exhibit No. 97 was marked for
21 identification.)

22 Q. (BY MR. EGLICK) Showing you what has been
23 marked as Exhibit 97 to your deposition. Can you
24 identify it?

25 A. This is a draft memo to Tom Fitzsimmons, the

1 director, from myself, and it's a briefing decision for
2 Port of Seattle Sea-Tac International Airport third
3 runway proposals expanded version for Tuesday meeting,
4 so it's an expanded version of another document I'd
5 created for purposes of going over the decision that we
6 were headed towards with senior management team.

7 Q. Now, when you say that this is a draft, you
8 notice the logo on here says "Tom Fitz copy" or the
9 handwritten notation says "Tom Fitz copy." Do you see
10 that?

11 A. Yes.

12 Q. So I assume -- and perhaps you can tell me --
13 this means that this was the copy that was sent to
14 Mr. Fitzsimmons and then ultimately produced to ACC on
15 public disclosure?

16 A. Yes. That must be.

17 Q. Then while this is labeled draft, it was
18 actually transmitted from you to Mr. Fitzsimmons; is
19 that correct?

20 A. Yes. It would have been.

21 Q. And then is this a draft because it needed
22 Mr. Fitzsimmons' approval before it went in a package,
23 for example, to the governor?

24 A. It was draft because it needed to be looked
25 at to make sure it was accurate before being considered

1 final, and it was not the version intended to go to --
2 a draft of the version intended to go to the governor's
3 office.

4 Q. Were any changes made in this document after
5 it was sent to Mr. Fitzsimmons?

6 A. I don't recall that there were any changes
7 made; that it was adequate for its purpose to brief
8 senior management team.

9 Q. And as far as you know, what's in it is
10 accurate; is that correct?

11 A. As far as I can tell.

12 Q. Well, you wrote it, right?

13 A. Correct. I'm just -- in response to your
14 question was there a subsequent version, I'm not
15 recalling if there was or not.

16 Q. I mean, in this particular exhibit here, did
17 you put anything in it intentionally that was
18 inaccurate?

19 A. Of course not.

20 Q. So as far as you know, Exhibit 97 is accurate
21 as far as you know?

22 A. It was meant to be accurate, yes.

23 Q. Now, let's take a look at --

24 (Deposition Exhibit No. 98 was marked for
25 identification.)

1 Q. (BY MR. EGLICK) -- Exhibit 98 to your
2 deposition. Can you identify it?

3 A. This is a news release. It was a
4 confidential discussion draft press release in the
5 event the Department of Ecology renders an approval
6 decision for the Port of Seattle's 401 permit
7 application to construct a third runway at
8 Seattle-Tacoma International Airport.

9 Q. Now, I notice although Gordon White had the
10 honor of signing the certification, you got the quote.
11 Do you see that on the second page?

12 A. Yes.

13 Q. So how come?

14 A. In my role as regional director, I am a
15 spokesperson in the region for the director, a member
16 of the senior management team, and the assumption being
17 it's appropriate for a senior manager to speak on
18 behalf of an action taken by Department of Ecology.

19 Q. And Gordon White isn't a senior manager?

20 A. Gordon is part of the executive management
21 team. He's not part of the senior management team.
22 The senior management team is extended to constitute
23 the executive management team when we add to it the
24 program managers for all the operating programs.
25 That's called the executive management team.

1 Q. And you were more hands-on anyway, weren't
 2 you, on the decision?
 3 A. I was more hands-on in terms of driving the
 4 process, yes.
 5 Q. And you're quoted here as saying, "I am
 6 confident that Ecology has reached a decision that is
 7 scientifically sound, technically feasible and legally
 8 defensible."
 9 A. That's correct.
 10 Q. And this was with regard to the August 10,
 11 2001, certification; is that right?
 12 A. Yes. Yes, it was.
 13 Q. And is there anything inaccurate in that
 14 quote?
 15 A. No. The quote is good.
 16 Q. So there's nothing inaccurate in it?
 17 A. No.
 18 Q. By the way, when the modified certification
 19 was issued on September 21 -- do you recall?
 20 A. Yes.
 21 Q. -- did you issue a press release and have a
 22 quote in that?
 23 A. I believe that we drafted talking points that
 24 included that quote, but I don't know that we did -- I
 25 don't believe we did a press release, but the quote

1 stands.
 2 Q. The quote about the August 10 decision?
 3 A. And it's applicable also to the September 21
 4 decision.
 5 (Deposition Exhibit No. 99 was marked for
 6 identification.)
 7 Q. (BY MR. EGLICK) Showing you what has been
 8 marked as Exhibit 99. Can you identify it?
 9 A. It's a briefing document. If you can give me
 10 a moment to look at it.
 11 Q. Sure.
 12 A. It looks to be documents and notes I put
 13 together for purposes of -- just a minute.
 14 Q. It's dated in the upper left August 16, 2001,
 15 right?
 16 A. That's correct.
 17 Q. So that's six days after the date of the
 18 certification that was issued in August, right?
 19 A. Yes.
 20 Q. So what's this all about?
 21 A. I believe this was prepared for purposes of a
 22 meeting that Tom Fitzsimmons and I had with port
 23 officials and Paul Isaki in downtown Seattle.
 24 Q. Now, what's Paul Isaki doing having a
 25 meeting? He's got his 401 issued for the port on

1 August 10, so why are you having a meeting when he's
 2 the guy from the governor's office, isn't he, the chief
 3 of staff?
 4 A. Yes.
 5 Q. So what's going on?
 6 A. The port had some questions about -- the port
 7 had questions relating to some of the terms and
 8 conditions in the 401 and was asking for clarification.
 9 Not knowing what all of the questions might be, I
 10 believe this document is an attempt to anticipate some
 11 of the concerns that might be discussed at the meeting.
 12 Q. Let me ask you a question about this. You
 13 have Elizabeth Leavitt's phone number, don't you?
 14 A. I do.
 15 Q. And I bet you're on her speed dial, don't you
 16 think?
 17 A. Probably.
 18 Q. So why is it that or do you know why the
 19 certification's issued on August 10 and you're finding
 20 out through Paul Isaki, the governor's chief of staff,
 21 that the port has questions about the certification?
 22 A. No. I was aware that the port had some
 23 questions prior to that.
 24 Q. Now, how were you aware of that?
 25 A. Tom Fitzsimmons and I had attended a port

1 commissioner meeting -- I believe it was a day or two
 2 after the decision, but I would have to check -- to be
 3 available to announce our decision to that body.
 4 Q. Wasn't that on the 14th?
 5 A. That may have been.
 6 Q. Of August?
 7 A. Yes. And at that meeting, following the
 8 commissioner's meeting in a brief exchange with Gina
 9 Marie Lindsey and Tom, I became more aware in general
 10 terms of some concerns that the port had with terms and
 11 conditions, not understanding them, needing clarity.
 12 Q. What do you mean more aware? Were you aware
 13 of it before?
 14 A. I should say made aware of. I can't recall
 15 if I had a conversation with Elizabeth prior to that
 16 commissioner meeting or not. It's possible that I did
 17 and she gave me a hint of some concern that they might
 18 have and the need for some clarification.
 19 Michael Cheyne was also at the commissioner
 20 meeting with Gina Marie Lindsey and made a few
 21 generalized statements about concerns they had that
 22 they needed clarification around some of the terms and
 23 conditions, so that was where my understanding that
 24 there were concerns was clarified somewhat.
 25 Q. So where does Paul Isaki fit in the picture,

201

1 then? If you had this exchange with the port staff at
2 the port commission, how did it happen that Paul Isaki
3 then is in the picture?

4 A. My understanding is that he would have
5 received a call from Mic Dinsmore.

6 Q. Mic Dinsmore is the port executive director?

7 A. Port executive director.

8 Q. Meanwhile, had you told staff that -- port
9 staff that you thought you'd done a fine job, the 401
10 was clear, and DOE was not going to entertain changes
11 or words to that effect?

12 A. Words to that effect. I believe that we felt
13 comfortable that it was clear. At the same time, we
14 understood that it was possible some of the language in
15 the 401 could be modified to clarify intent without
16 weakening it.

17 Q. So Exhibit 99 was prepared after this
18 encounter at the port, after Mic Dinsmore called the
19 governor's chief of staff, Paul Isaki, and complained,
20 and in anticipation of a meeting that was going to
21 occur with the port. Is that the correct context?

22 A. Yes.

23 MR. REAVIS: Objection; lack of foundation.

24 Q. (BY MR. EGLICK) Then looking at Exhibit 99,
25 there's some handwritten notes at the top, and I assume

1 those are your handwriting?

2 A. They are.

3 Q. And can you read those into the record if you
4 would?

5 A. I'll try.

6 Q. By the way, I should clarify. Where it says
7 -- I believe your copy says on it in the upper right
8 "AEG copy." Do you see that?

9 A. Yes.

10 Q. That's Andrea Elizabeth Grad copy. That's a
11 notation by Helsell Fetterman paralegal. Just for the
12 record so everyone knows that's not part of the
13 document, is it?

14 A. The monitoring and reporting requirements in
15 the 401 and additional planned information submittals
16 increases the chance of success to the mitigation. If
17 it fails, the conditions require more mitigation. It's
18 what makes the 401 defensible.

19 Q. Let me ask you a question, and maybe I guess
20 you're the best judge of your writing, but I see where
21 it says the word "monitoring" and then it says "slash
22 reporting." Do you see that?

23 A. Yes.

24 Q. And then there's a forward slash. Do you see
25 that?

203

1 A. Yes.

2 Q. And then is that supposed to be a caret of
3 some sort?

4 A. That's a greater than.

5 Q. And then it says "plans."

6 A. So more plans.

7 Q. And then what are the next letters? You said
8 increase.

9 A. Ensure.

10 Q. So it's ensure; it's not increase?

11 A. It's ensure.

12 Q. "Success of mit," is that mitigation?

13 A. Mitigation. If it fails, conditions require
14 more mitigation. It's what makes the 401 defensible.

15 Q. And on the right-hand side in the margin you
16 have something that looks like FTES.

17 A. FTES, and that's related to --

18 Q. Full-time equivalents?

19 A. Full-time equivalents. The port agreed in
20 concept before we even made a decision that if we ever
21 got to the point of a decision that it would make
22 resources available to ecology to help us oversee
23 compliance with the terms and conditions of the 401.
24 Otherwise for us to do so it created a capacity issue
25 for us in the region.

1 Q. Now, looking at the typewritten -- well,
2 actually, on the bottom right, does that say back thru?

3 A. "Break thru."

4 Q. What does that mean?

5 A. I would need to read this document, and even
6 then I still might not remember the context, but let me
7 see. I can't recall.

8 Q. Now, look at the top portion of the document,
9 then. Overriding messages, that was the message you
10 were going to give to the port in the meeting; is that
11 right?

12 A. These are overriding messages that I talked
13 with -- I was getting ready -- I was supposed to be --
14 I was packing my car going on vacation that day. Tom
15 picked me up at the house. This is a document I used
16 to brief him on the way up to Seattle.

17 Q. So this is what you're telling Tom, ecology
18 is overriding messages?

19 A. It was my perspective of what would be some
20 good overriding messages.

21 Q. For ecology?

22 A. For ecology.

23 Q. Now, the first bullet here is, quote, we
24 believe the 401 is clear, end quote; is that right?

25 A. That's right.

1 Q. Then you say, quote, the port should not be
2 surprised by the conditions?

3 A. Yes. By the conditions. Would you like me
4 to read it?

5 Q. Well, I just want to make sure I'm
6 understanding this. You're talking about the
7 conditions in the 401, right?

8 A. That's right.

9 Q. In the August 10 401?

10 A. That's right.

11 Q. You're saying the certification's clear, the
12 conditions shouldn't be a surprise. Then you say in
13 the second bullet, "Essentially the Port got what it
14 wanted given the time constraints"; is that right?

15 A. That's what it says.

16 Q. Now, are you talking about the time
17 constraints we established before? You didn't have to
18 issue that certification until December 2001, did you?

19 A. That's correct.

20 Q. So what time constraint are we talking about
21 again there? If it's a self-imposed time constraint by
22 ecology, why would you be saying in here essentially
23 the port got what it wanted given the time constraints
24 if ecology didn't impose the time constraints?

25 A. We imposed the constraints on ourselves.

1 Q. So why is that the port's fault?

2 A. It's no secret the port was interested in a
3 decision sooner rather than later.

4 Q. So you're talking about time constraints that
5 the port through one means or another was able to
6 impose on the decision?

7 A. No. I wouldn't conclude that. I would
8 conclude that given the amount of time we've had the
9 runway in front of us, the amount of information we had
10 in front of us, we set a very aggressive goal to make a
11 decision. Yes, there was pressure out there. Yes,
12 there was interest. But the actual time frame was
13 self-imposed.

14 Q. And it was self-imposed in light of the
15 pressure coming from the port, right?

16 A. In light of our need to move that decision,
17 in light of our need to get on to other work, in light
18 of all of the circumstances around us.

19 Q. In light of the pressure coming from the
20 port, correct?

21 A. Pressure from the port was one variable.

22 Q. And, in fact, the time constraint wouldn't
23 have been set for August were it not for pressure from
24 the port and from the port through the governor's
25 office and so on down the chain, correct?

1 A. I won't agree with that.

2 Q. Well, would you disagree with it?

3 A. As I just said, it was one of the variables.

4 Q. What's "it"?

5 A. Pressure from the port, interest on the part
6 of the port in the decision sooner rather than later
7 was one of the variables affecting the self-imposed
8 time constraints.

9 Q. So the second sentence of this bulleted item
10 says, "Now it wants us to build back in more certainty
11 after the fact." You're saying here, well, we could
12 have done better if the port had given us more time,
13 aren't you?

14 A. This is an informal briefing document, and
15 I'm pausing because I'm wanting to remember the context
16 around this and the intent. The port was asking for
17 clarity, clarity that would give it more certainty with
18 regard to what the terms and conditions require, and I
19 think the context here is that if we had taken more
20 time to make the decision, perhaps the language would
21 have been clearer.

22 Q. And more to the port's satisfaction?

23 A. Well, if the port understood it, I suppose it
24 would have been more satisfied.

25 Q. But you didn't agree that it was unclear to

1 begin with, did you?

2 A. We thought it was clear, but once the -- when
3 the questions were posed by the port, we understood
4 after we heard the questions that it might be
5 appropriate to do some clarifying of the language to
6 give them certainty with respect to what the terms and
7 conditions meant.

8 Q. Is there anything in the August 10 401 that
9 you think now is unclear?

10 A. We understood the intent. Ecology
11 understood. It was clear from ecology's perspective
12 what the 401 meant. I think it's understandable and
13 reasonable for the port to have questions about the
14 language, which they did, and so we agreed it was
15 appropriate to clarify some language.

16 Q. Is there anything in the August 401 that you
17 think even now is unclear?

18 A. I can't answer that now. I'd have to go back
19 and read the entire document.

20 Q. You're not familiar enough with the August 10
21 401 to know whether you think there's something unclear
22 in it?

23 A. I don't have the August 10 401 memorized. I
24 would need to go back and look at it.

25 Q. Can you think of anything off the --

1 A. At the time, I recall thinking it was clear.
 2 Q. Going on in this Exhibit 99 --
 3 A. Excuse me. Can we pause and I can make a
 4 phone call? Then I'm more than happy to continue.
 5 Q. Absolutely.
 6 (Recess taken.)
 7 (Deposition Exhibit No. 100 was marked for
 8 identification.)
 9 Q. (BY MR. EGLICK) Could you take a look at
 10 Exhibit 100? It's actually an e-mail string, but what
 11 I'm particularly interested in your looking at is the
 12 part of the string that relates to e-mail from Chung
 13 Yee to Craig Thompson cc Kevin Fitzpatrick, which
 14 starts on the bottom of the first page of Exhibit 100.
 15 Do you see that?
 16 A. Yes.
 17 Q. If you could take a look at the first and
 18 second page, that would be helpful.
 19 A. Okay.
 20 (Mr. Witek returned.)
 21 A. I've reviewed those first two pages.
 22 Q. Now, what I wanted you to focus on in
 23 particular is the Chung Yee e-mail as I said June 26 to
 24 Craig Thompson and Kevin Fitzpatrick. Now, who was
 25 Chung Yee on June 26, 2001?

1 A. Chung Yee at that time I believe was down
 2 working for the toxics clean-up program in Lacey.
 3 Q. And now he works where?
 4 A. I believe he's still there.
 5 Q. Who is Craig Thompson?
 6 A. I'm not remembering who Craig is.
 7 Q. Do you know who Kevin Fitzpatrick is?
 8 A. Yes. He's the section manager for the water
 9 quality program in the Bellevue office.
 10 Q. Now, I want you to look over on the second
 11 page of this Exhibit 100, and you'll agree with me that
 12 Chung Yee is talking about what the NWRO/WQP has
 13 proposed for a soil sampling schedule for petroleum?
 14 Do you see that?
 15 A. Which paragraph is that?
 16 Q. That's the second to the last paragraph on
 17 the second page of Exhibit 100.
 18 A. Okay. Yes.
 19 Q. And what's the NWRO/WQP?
 20 A. Northwest regional office water quality
 21 program.
 22 Q. So who is that? Is that Kevin Fitzpatrick?
 23 A. Yes.
 24 Q. Now, a soil sampling schedule proposed by the
 25 NWRO/WQP we already talked about, isn't it? It's the

1 one that says six samples, right?
 2 A. Yes.
 3 Q. As opposed to what was the recommendation
 4 otherwise made by the toxics program? Do you recall
 5 how many samples?
 6 A. 226.
 7 Q. Or was it 236?
 8 A. It says 226 on this document.
 9 Q. I'll accept that. So could you read the
 10 sentence where -- would you agree Chung Yee is
 11 explaining here why he went with NWRO/WQP's
 12 recommendation rather than the TCP guidance?
 13 A. I did not change the -- I'm reading from that
 14 document. I did not change the soil sampling schedule
 15 as proposed by the Northwest Regional Office Water
 16 Quality Program since I consider the toxic clean-up
 17 program's guidance for a petroleum-contaminated soil
 18 may not be applicable to this project. Cost issue.
 19 Q. He puts in parentheses cost issue, right?
 20 A. Yes.
 21 Q. Now, was this -- if you recall, I asked you
 22 before about this cost issue. This was a factor,
 23 wasn't it, that was discussed by the NWRO/WQP that it
 24 didn't want to require the sampling that the TCP
 25 guidance called for because it would be too expensive

1 for the port?
 2 A. The water quality program wouldn't have
 3 agreed to concur that we could have reasonable
 4 assurance that water quality would be protected if it
 5 thought that this wasn't appropriate.
 6 Q. Well, I appreciate that, but I'm going to ask
 7 you, Mr. Hellwig, especially now that we're after five,
 8 if you could answer my question, so I'll have the
 9 reporter read it back.
 10 (The reporter read back as requested.)
 11 A. I'm trying to answer your question. We have
 12 a goal to be reasonable in our decision making, but I
 13 don't think that this cost issue was a basis for this
 14 what was driving our need to be reasonable and
 15 appropriate and at the same time make a defensible
 16 decision.
 17 Q. (BY MR. EGLICK) So Chung Yee must have
 18 misunderstood something that the NWRO/WQP had indicated
 19 about whether the TCP guidance was applicable?
 20 A. I'm not sure I understand. I mean, there's a
 21 cost issue. There can be a cost issue, but the cost
 22 issue doesn't necessarily drive or formulate the basis
 23 of a decision.
 24 Q. Well, can you show me anywhere where an issu
 25 other than cost is identified as the basis for going

1 with the substantially, I think you would agree, less
2 samples than the 226 that the TCP guidance called for?

3 A. I'm recalling two cost issues. One was a
4 cost issue to the port. One is the cost issue to
5 ecology to review samples or to look at them or to do
6 the work that we have to do associated with that.

7 Q. So you're saying there were two cost issues?

8 A. I'm recalling two cost issues as we continue
9 this question-and-answer discussion. I'm not sure now
10 that we've continued to talk about it if this cost
11 issue is relating to what might have been a cost issue
12 for the port or a cost issue that he heard about with
13 respect to ecology not having the capacity to screen or
14 review samples.

15 Q. Either way, with regard to the cost issue or
16 issues, the result was that the TCP guidance was not
17 adopted and instead, as I said I think you would agree,
18 substantially fewer, six as opposed to 226, samples was
19 required; is that correct?

20 A. Yes. That's substantially fewer samples.

21 Q. Just to make sure, because I asked this and
22 I'm not sure you addressed it directly, could you point
23 to any other basis on which -- other than one cost
24 issue or another on which it was decided to go with six
25 samples rather than 226 samples?

1 A. No.

2 Q. Now, if we could go back to Exhibit 99, and
3 that was the overriding message exhibit.

4 A. Yes. I have it.

5 Q. And look at the second page if you would,
6 which is, I think, going to be very challenging. It's
7 your handwriting, isn't it?

8 A. Yes, it is.

9 Q. And you've got a date on the upper left of
10 August 17, 2001.

11 A. That's correct.

12 Q. And on this exhibit, you seem to have been
13 taking notes, and were these notes taken at this
14 meeting with the port and Paul Isaki? I could be
15 wrong. I'm just asking.

16 A. May I have a moment?

17 Q. Sure. Absolutely.

18 A. Yes.

19 Q. Just because we kind of interrupted to finish
20 off that other exhibit, where did that meeting take
21 place on August 17, 2001?

22 A. I'm not remembering the name of the building.
23 It was in downtown Seattle.

24 Q. Was it in a port office?

25 A. No. I'm just not remembering.

1 Q. It was in an office, though?

2 A. Yes.

3 Q. And attendees were yourself, Tom Fitzsimmons,
4 Paul Isaki, and anyone else?

5 A. Mic Dinsmore and Gina Marie Lindsey.

6 Q. And we've already identified who they are.
7 They're folks from the port.

8 Now, these are then -- these handwritten
9 notations then were taken contemporaneous with that
10 meeting?

11 A. Yes.

12 Q. And how long did that meeting last
13 approximately?

14 A. Half hour to 45 minutes.

15 Q. And was there a copy or copies of the August
16 certification there at the meeting?

17 A. I believe so.

18 Q. And did Mr. Isaki participate actively in the
19 meeting?

20 A. No.

21 Q. What did he do?

22 A. He mostly just listened, observed, and made a
23 couple of comments in the end.

24 Q. And what were the comments he made in the
25 end?

1 A. I believe the comments in the end related to
2 it sounds like you're talking to each other and you
3 know where you can -- I don't remember the exact words.
4 Something to the effect it looks like you're working
5 together on this.

6 Q. Working together on this?

7 A. On the issues that the port was presenting.

8 Q. So I take it, then, that by the time the
9 meeting was over and Mr. Isaki made those comments the
10 typewritten notes of August 16 were at least in part
11 inoperative because you were working together with the
12 port on making changes to the August certification; is
13 that correct?

14 A. The purpose of the meeting was to identify
15 areas of concern where the port needed clarity, and I
16 believe it also involved a little bit of discussion
17 about our working relationship. In the end, I don't
18 recall any specific direction from Paul Isaki.

19 What I recall is agreement with Fitzsimmons
20 -- between Fitzsimmons, myself, and Gina Marie Lindsey
21 and Mic Dinsmore to having respective internal meetings
22 and then talk about the need to get together and
23 identify ways to add clarity to the language in the
24 401.

25 Q. Looking at the previous page, typewritten

1 page. Do you see the bulleted point that says, "But -
2 first we should ask the port to put into writing what
3 is unclear"?

4 A. Yes.

5 Q. Did you ever get that?

6 A. What we decided was that we would have a
7 conference call, and from that call we would document
8 the concerns that way.

9 Q. So you didn't ever get the first put it in
10 writing that you have put in your August 16 note?

11 A. I don't recall that we did that. I'm not
12 remembering the exact reason why we changed our
13 approach.

14 Q. And looking at the bottom of this page, you
15 say "Special Note," quote, we are now in a
16 prelitigation or litigation prep mode and should not
17 release information pursuant to the PDA until we get
18 clarification from the AAGs, end quote. That's the
19 assistant attorney generals?

20 A. That's correct.

21 Q. So you had these notes about a meeting with
22 the port where the port was asking for changes in the
23 401 that had just been issued and you were saying we're
24 not going to release these notes pursuant to any public
25 disclosure request; is that right?

1 A. It would be -- documents I would be referring
2 to would be briefing documents that I prepared for Tom
3 and I, not notes taken at a meeting with the port,
4 although -- and the attorneys would remind us regular.
5 what should and should not be held for any particular
6 reason.

7 Q. Well, your note at the bottom of this Exhibit
8 99 first page says we should not release information.
9 It doesn't discriminate.

10 A. That's correct. I'm trying to think back to
11 that time. I had questions -- I needed clarity, and so
12 I would need -- that's just indicating that I would
13 need to continue to touch base with our attorneys with
14 respect to what should be disclosed pursuant to the
15 PDA.

16 (Deposition Exhibit No. 101 was marked for
17 identification.)

18 Q. (BY MR. EGLICK) Showing you what has been
19 marked as Exhibit 101 to your deposition. Can you
20 identify it?

21 A. It's an e-mail from myself to Tom Fitzsimmons
22 dated August 16. It says, Attached are some ideas from
23 conversations I had with you, Paul Isaki, and Joan
24 Marchioro. "Please see special note regarding public
25 disclosure. See you at 1:15."

1 Q. So you're attaching your August 16 memo,
2 which has these statements and information in it about
3 the port's complaints and what ecology's responses and
4 message should be, and you're telling the director of
5 the Department of Ecology to take a look at that
6 special note at the bottom of the page about not
7 releasing this information to the public; is that
8 right?

9 A. Yes.

10 Q. Now, did you ever issue a press release
11 saying -- responding to the port's complaints and
12 saying we're really disappointed in the port for
13 putting us through all this and then immediately asking
14 us to do it over?

15 A. No. Not that I recall.

16 Q. So when someone complains about a decision
17 you've issued, that's not a topic for a press release,
18 is it?

19 A. Not typically.

20 (Deposition Exhibit No. 102 was marked for
21 identification.)

22 Q. (BY MR. EGLICK) Take a look at Exhibit 102
23 and identify it.

24 A. That's a document produced by Curt Hart, who
25 was at the time the public information manager for me

1 at northwest regional office, to myself, Ann Kenny,
2 Joan Marchioro, and Gordon White, draft talking points
3 third runway permit appeal and attachments, and here it
4 is.

5 Q. Now, what's the date on this?

6 A. August 27.

7 Q. Now, your meeting with the port was August
8 17?

9 A. I believe so.

10 Q. So we're at August 27. We got draft talking
11 points from Curt Hart, and did you have any problem
12 with any of these talking points, any corrections,
13 changes?

14 A. May I have a moment?

15 Q. Sure.

16 A. Looking it over briefly, I don't catch any
17 concern off the top of my head. This is not a press
18 release, of course. This is internal talking points.

19 Q. Talking points that were prepared by the
20 public information officer so when the press calls this
21 is what you're supposed to talk off of, right?

22 A. Yes.

23 Q. It's what's called in the PR business
24 staying, quote, on message, quote?

25 A. Yes.

1 Q. Now, looking at the third paragraph down, it
 2 says, quote, we are disappointed by the Coalition's
 3 action. That's a reference to ACC, my client, isn't
 4 it?
 5 A. Yes.
 6 Q. Quote, because we are confident our permit is
 7 scientifically sound, technically feasible and legally
 8 defensible, end quote.
 9 A. Right.
 10 Q. So there you are. It's August 27 and ecology
 11 still feels that way; is that right?
 12 A. Yes.
 13 Q. Now, how many days was it after that that you
 14 agreed with the port to rescind and issue a new
 15 modified 401?
 16 A. Well, that was in September.
 17 Q. Is there anything in these talking points
 18 that refers to the fact that you're negotiating with
 19 the port on changes to the 401 certification issued in
 20 August?
 21 A. I'm not detecting them right away.
 22 Q. Do you need more time or are you pretty
 23 certain of that?
 24 A. I'm pretty certain of that.
 25 Q. Let's look back on Exhibit 99, the

1 handwritten page which is the second page of Exhibit
 2 99.
 3 A. Okay.
 4 Q. These are your notes once again of the
 5 meeting that took place and you said you in an office
 6 building but you don't know which one?
 7 A. I don't recall --
 8 Q. And you don't know whose office it was?
 9 A. It was -- it's slipping my mind. It's a
 10 club. It wasn't in the port offices. It wasn't law
 11 offices.
 12 Q. Rainier Club?
 13 A. No. Not the Rainier Club.
 14 Q. College Club?
 15 A. No. It might have been that one. I'm just
 16 not remembering the name of the building, but it was
 17 downtown.
 18 Q. Harvard Club?
 19 A. That was it.
 20 Q. How appropriate. It's the port, right?
 21 A. There you go.
 22 Q. So you were in a meeting at the Harvard Club
 23 I guess in a meeting room or you were having lunch
 24 there?
 25 A. Meeting room. There was coffee.

1 Q. And you're going over this list, and the port
 2 is telling you what's wrong with the 401; is that
 3 right?
 4 A. They were going over the concerns that they
 5 had.
 6 Q. Why don't you just run through these notes
 7 quickly if you could so the reporter can get them down,
 8 or if you want, I'll run through them and you can tell
 9 me if I've got it wrong, but I don't know which is
 10 faster. It's up to you.
 11 A. I can go through them. I'm not sure how much
 12 sense they're going to make at this stage of the game.
 13 The first point I have here, I have a little star at
 14 the top of it where I have underlined clarity and that
 15 would be reasonableness is our intent. There's an
 16 arrow drawn toward intent.
 17 There's notes up there about depositions. I
 18 suppose that would be in reference to future
 19 depositions. FTEs, help. Ecology would be looking for
 20 resources from the port to help -- that we would manage
 21 to help us oversee compliance. Reference to appeal,
 22 rescind --
 23 Q. Now, who is going to appeal?
 24 A. The port.
 25 Q. And who is going to rescind?

1 A. Possibly ecology.
 2 Q. Well, nobody else could rescind --
 3 A. Right. It's there as an option, as an
 4 alternative.
 5 Q. Let me ask you a question, because it just
 6 caught my eye here. Do I see my client referred to
 7 kind of to the left of the words appeal and rescind?
 8 A. Yes.
 9 Q. What does that say?
 10 A. It says increased exposure with ACC et al.
 11 Q. What does that mean?
 12 A. Let me start at the top here with these
 13 little bullets in my notes. Categories of concern,
 14 ambiguities. That was in reference to identifying
 15 them. Approval required 401 shoreline permits. I'm
 16 not recalling specifically what that was in reference
 17 to.
 18 Time frame, just a discussion about the
 19 appeal period with respect to whether or not there
 20 needed to be an appeal or what the appeal time frame
 21 was, I expect. Next bullet has to do with retrofitting
 22 two for one. What was the intent? Was ecology --
 23 there was a need for clarification from ecology
 24 regarding retrofitting requirements.
 25 Q. According to the port; is that correct?

1 A. According to the port. And I think that's
 2 one of the areas where we looked at the 401 and we
 3 thought there was room for some clarification if I
 4 recall. Then increased exposure with ACC et al. I
 5 think that we were cognizant that meeting with the port
 6 and discussing possible clarifying language to the
 7 initial 401 would not be viewed in a positive manner by
 8 opponent groups.

9 Q. That's what you meant by increased exposure,
 10 or was it legal exposure?

11 A. I don't believe it was legal exposure. I
 12 think it was increased exposure, just us meeting with
 13 the port, discussing the issues exposed us to criticism
 14 by ACC and others.

15 Q. Because the 401 certification had already
 16 been issued?

17 A. Because we'd issued it and there would be a
 18 perception possibly that ecology would consider
 19 weakening the 401, which we would not and did not do.

20 Q. Now, looking down below here, I'm going to
 21 skip some of these things. I've got a question here.
 22 You have a circled item in the middle of the page
 23 almost, and if I'm reading it correctly, does it say
 24 retrofit schedule behind already?

25 A. Yes.

1 port expressed concern that it was already behind on
 2 its retrofit schedule; is that correct?

3 A. Its interpretation of the retrofit schedule
 4 with regard to a certain percent of the existing
 5 facility would need to be retrofitted in conjunction
 6 with a certain build-out of the new project that my
 7 recollection is the way it was drafted they were
 8 already behind retrofitting.

9 Q. So if they would have had to comply with that
 10 schedule, it would have delayed their build-out; is
 11 that correct?

12 A. Possibly, but I might not have that right.

13 Q. And the retrofit was required for reasons of
 14 water quality, was it not?

15 A. Yes.

16 Q. And the retrofit condition and schedule in
 17 the August 401 certification had been reviewed by
 18 everyone who reviewed the certification, and to your
 19 knowledge, isn't it true, no one within ecology raised
 20 any objection to it, correct?

21 A. I believe it was discussed, and I'm not
 22 recalling if there was an objection or not. I don't
 23 believe there was.

24 Q. There's a reference here -- do you see just
 25 below the one about the retrofit schedule there's a

1 Q. Now, that is a reference to the port schedule
 2 for retrofitting that was part of one of the conditions
 3 in the certification, wasn't it?

4 A. There's reference to a retrofit schedule and
 5 a percentage of retrofitting that would occur as the
 6 project was built and some concern that the way the
 7 condition was written if I recall -- and I could be
 8 wrong here -- that the port was already behind schedule
 9 and how -- the question was how is that reasonable?

10 Q. So, in other words, the port's point was if
 11 we're already behind schedule in retrofit, then it's
 12 not reasonable to impose that schedule in the 401?

13 A. I believe their contention was that the
 14 condition might not even be logical given the
 15 requirement, but I'm not recalling the specifics.

16 Q. So, in other words, the schedule bends to the
 17 port rather than the port to the schedule?

18 A. I'm not sure.

19 Q. Well, if the schedule is appropriate and the
 20 port is behind, what should bend?

21 A. I'm not sure I was clear with my earlier
 22 statements, and I'm not sure I understand your
 23 question.

24 Q. Well, then let me ask another one rather than
 25 you trying to answer one you don't understand. The

1 reference to fill criteria? Do you see that?

2 A. So you're looking at the fill criteria note?

3 Q. It says fill criteria --

4 A. It says beyond -- what we're requiring out of
 5 the port is already beyond what Fish and Wildlife and
 6 its services would require, and it was a discussion
 7 relating to the federal regulations saying that toxic
 8 fill can't be brought in in toxic amounts but there's
 9 no federal guidance and that what ecology was requiring
 10 for this project was already way far beyond what we
 11 were requiring in terms of any significant project in
 12 terms of fill.

13 Q. Wasn't the issue for the fill not just the
 14 rubric of toxic fill and toxic amounts but also having
 15 procedures and criteria in place to ensure that water
 16 quality standards, including the anti-degradation
 17 standard, is not violated?

18 A. I believe that's correct.

19 Q. So, in other words, it wouldn't necessarily
 20 have to be toxic amounts for there to be a problem if
 21 fill was if you will dirty enough to create or violate
 22 the anti-degradation standards; isn't that correct?

23 A. We had reasonable assurance that would not
 24 happen.

25 Q. Well, I'm not asking you that. I'm asking

1 you whether the anti-degradation standard is a
2 requirement that has to be met regardless of whether
3 these are toxic amounts.

4 A. That's my understanding, but I would consult
5 with our water quality people as needed.

6 Q. By the way, are you aware that ecology in
7 some pleadings has apparently adopted the position that
8 there are now no restrictions on importation of fill to
9 the third runway or airport site?

10 A. I'm not aware of that.

11 Q. Do you agree or disagree that there are now
12 restrictions criteria that apply to the importation of
13 fill to the airport site?

14 A. My understanding is that -- let me pause
15 here. My understanding is that there are some concerns
16 related to how the effect of legal proceeding -- that
17 the effect of the legal proceedings on the 401 might be
18 to lower some protections. Now, if that pertains to
19 fill criteria, then that would be a concern, but I
20 would need to talk to staff and to our attorneys about
21 the effect of the stay on the terms of the 401 and what
22 is or is not in effect subsequent to any effect of the
23 stay on the 401.

24 Q. Well, what was -- I'm sorry. Did you want to
25 say more?

1 A. No. That's it.

2 Q. What was in effect prior to issuance of the
3 401?

4 A. We had a clean fill criteria agreement with
5 the port going back several years that my recollection
6 is was negotiated or developed and imposed by the
7 clean-up program on the port.

8 Q. And do you have any information that that
9 agreement is now not in effect?

10 A. I'm not aware of the status of the agreement
11 right now.

12 Q. Do you have any information that the
13 agreement is not in effect?

14 A. No.

15 Q. So as far as you know, what was in effect for
16 the whole period of time before there was a 401 in
17 terms of fill criteria is still in effect as far as you
18 know?

19 A. I don't know.

20 Q. Anyone given you notice in your capacity as
21 management lead in all those other things that you
22 described for the airport project that it's not in
23 effect anymore?

24 A. No.

25 Q. That's something as director of the northwest

1 regional office you would expect to know, wouldn't you?

2 A. I don't need to be aware of every single
3 detail recommended to every single project that's being
4 implemented in the northwest region.

5 Q. Do you consider it to be a mere detail
6 whether there are fill criteria in effect for the
7 importation of millions of cubic yards of fill to the
8 airport site, Mr. Hellwig?

9 A. I didn't say that.

10 Q. Well, is that what you are communicating that
11 it's a detail?

12 A. I would want to stay informed.

13 Q. And you would expect that your staff would
14 inform you, wouldn't you?

15 A. Yes. For that particular situation, yes.

16 Q. And as director of the northwest regional
17 office of the Department of Ecology, would you sit
18 still for the port importing quantities of fill to the
19 airport site without fill criteria?

20 A. No.

21 (Deposition Exhibit No. 103 was marked for
22 identification.)

23 Q. (BY MR. EGLICK) Looking at what's been marked
24 as Exhibit 103 to your deposition. Can you identify
25 it, please?

1 A. Let's see. This is a copy of a message to me
2 from Joan Marchioro on August 28 regarding a letter
3 from the board setting a hearing for March 18 through
4 29, 2002, for the ACC's appeal.

5 Q. And what's attached?

6 A. It's a document, my notes, with a title of
7 Questions/Ideas.

8 Q. And what's it dated?

9 A. It was dated August 27, '01.

10 Q. So by then, are you in the middle of
11 negotiations with the port about changes to the August
12 10 401?

13 A. I'm not recalling when we had our meetings
14 with the port where we had our conference call and
15 worked through the concerns that we were hearing from
16 them, so I'm not sure exactly where this is in relation
17 to that. I believe that this is most likely -- let me
18 look at it for a minute. This was most likely in
19 preparation for a part of that process, those meetings
20 and that process. This looks like a summary of
21 concerns that I expected we would be discussing.

22 Q. So one was Port of Seattle business-related
23 concerns-costs. Do you see that?

24 A. Yes.

25 Q. And then you have written on the side

1 apparently in response to that concern, quote, too bad,
2 quote.

3 A. Too bad. Not an issue for us. We want a
4 defensible decision. If it's going to cost them, it's
5 going to cost them.

6 Q. So this was an argument against changing the
7 401 that had been issued on August 10; is that right?

8 A. It was an argument to not weaken the 401.

9 Q. So these things with the arrows on the left
10 of them are all arguments -- points the port was making
11 and then your response on why the 401 should not be
12 altered; is that right?

13 A. I believe these were notes to myself in
14 preparation for meetings and things I wanted to be
15 prepared to discuss that I may or may not have gone
16 over with other staff on prior to conference calls or
17 meetings with the port and a list of things I expected
18 we'd be discussing.

19 Q. Could you look down at the arrow that then is
20 followed by the letters? Is that AFC?

21 A. That's acceptable fill criteria.

22 Q. And then you have "does"?

23 A. Yes.

24 Q. And then it says, quote, applies to all MPU
25 projects.

1 A. This is where I'm indicating that this will
2 be something that we discuss, a question I needed to
3 ask that I expected the port would want us to discuss.
4 Does the acceptable fill criteria apply to all MPU
5 projects? Is there a cumulative effect concern?

6 Q. Now, I don't see the words is there a
7 cumulative effect concern? I just see the words
8 cumulative effect concern. So are you adding the "is
9 there" in reading the notes?

10 A. I added the "is."

11 Q. When you wrote these notes on August 27, what
12 was your understanding as to whether the fill criteria
13 applied to all MPU projects?

14 A. I believe that I didn't have a clear
15 understanding of the applicability of that acceptable
16 fill criteria, and that's one of the reasons it's on
17 here.

18 Q. So you didn't know whether the fill criteria
19 applied to all MPU projects?

20 A. I believe that my general understanding was
21 that it did.

22 Q. And isn't that because the August 401 said
23 that it applied to all MPU projects, didn't it?

24 A. I believe that it did.

25 Q. And that's one of the things that was

1 changed, wasn't it, in the September 21, 2001, modified
2 certification?

3 A. Yes.

4 Q. And what's the difference?

5 A. My recollection is that we agreed it was
6 reasonable given the circumstances for some of the
7 projects to not require the application of the criteria
8 and that in so doing we still would have reasonable
9 assurance that water quality would be protected given
10 the circumstances or nature of those projects.

11 Q. And what I'd like you to do is take a moment,
12 look at the August certification, the September
13 certification, and show me where if I am the Pollution
14 Control Hearing Board and I'm trying to figure out
15 whether you had reasonable assurance and so on where I
16 could go look in the September certification, for
17 example, to know which MPU projects are in and which
18 are out with regard to the fill criteria.

19 A. Well, now, that might take some time. If you
20 know where you think that is --

21 Q. I can't find any clear answer to that,
22 Mr. Hellwig, now that you've asked me, but I'm hoping
23 you'll educate me.

24 A. I believe I would need some time to look at
25 the documents. Do you want to do that now?

1 Q. It depends how familiar you are with them.

2 A. I think if we look at section E. I believe
3 it's section E, so that starts on page 14, conditions
4 for acceptance of fill to be used in construction of
5 the third runway. Now let me get to that section in
6 each document. The first paragraph refers to -- reads,
7 The use of imported fill for projects for which the
8 section 404 permit was sought; e.g. or example, third
9 runway, runway safety areas, south aviation support
10 area, and other appropriate master plan improvements as
11 determined by ecology --

12 Q. Now, stop right there if you would, please.
13 Now, what page are we on?

14 A. We're on page 14 at the bottom.

15 Q. Of which certification?

16 A. The September certification.

17 Q. That's what I needed. So the answer is,
18 then, these listed projects -- and there's the third
19 runway, the RSAs, the SASAs, and then it says and other
20 appropriate master plan update improvements as
21 determined by ecology, port 404 projects may result in
22 impacts to wetlands or other waters of the state, end
23 quote. That's what you're relying on; is that right?

24 A. Yes.

25 Q. Now, when did ecology make the determination

1 as to what those other appropriate projects that come
2 under the fill criteria were?

3 A. My understanding was we were going to receive
4 or would be receiving a list of projects from the port
5 and that we would be making a determination with
6 respect to that question once we had the list. I'm not
7 sure what the status of the situation is with the list
8 and determinations that we've made.

9 Q. So if I want to know what your reasonable
10 assurance is in terms of a particular project that's
11 part of the master plan improvements with regard to
12 fill criteria, I got to wait until I get that list and
13 know what ecology has determined is in and out and then
14 know the basis on which ecology determined that
15 sometime in the future and then we can talk about it;
16 is that right?

17 A. If I understand what you said, that's
18 probably correct. What will have to happen is ecology
19 -- the port will have to get approval from ecology for
20 the fill criteria not to be applied to a given project,
21 and you can ascertain that information from ecology.

22 Q. So when we're in front of the PCHB in March
23 and the PCHB is trying to decide, well, has the
24 coverage of the fill criteria been cut back in some way
25 that eliminates reasonable assurance between August and

1 September, how is the PCHB going to know based on this
2 September 401 what's in and what's out?

3 A. My assumption is by then we're going to have
4 the information.

5 Q. By March what?

6 A. By the time of the hearing. We may have the
7 information now. As I indicated earlier, I don't know
8 if we've received the list of projects and how far
9 we've gotten into looking at them and making a
10 determination with respect to where the fill criteria
11 applies or not. I don't know where that's at.

12 Q. In fact, it wouldn't be just a matter of
13 getting the port's list. Then ecology would have to go
14 back and decide whether it agreed with whatever pitch
15 the port had made as to what was in and out; isn't that
16 right?

17 A. That's probably correct.

18 Q. Now, originally there was a JARPA, wasn't
19 there, an application for this port master plan and
20 improvements, right?

21 A. Yes.

22 Q. Now, the JARPA essentially was tracked by the
23 August 401 that said everything's in, all the MPU
24 improvements; is that right?

25 A. That's correct.

1 Q. And the difference then if I'm understanding
2 correctly between the August certification and the
3 September certification is the September certification
4 has removed some portion of what was covered in the
5 JARPA and covered in the August certification, but we
6 don't know precisely what that portion is yet; is that
7 correct?

8 A. That's being determined.

9 Q. So we don't know it right now, do we?

10 A. My understanding is we don't have that
11 clarity yet, no.

12 Q. Now, is there a list of criteria that have
13 been developed that you can refer me to that talk about
14 how you decide whether something should be in or out?

15 A. I'm reading through the document briefly, and
16 I believe that I'm forgetting the question now.

17 Q. My question is -- and let me put it to you in
18 a slightly different form. If I want to know what the
19 fill criteria are for better or worse, I can read them
20 in the 401, can't I?

21 A. Yes.

22 Q. If I want to know what the criteria are for
23 deciding whether a project is going to be subject to
24 the fill criteria, this future decision that's going to
25 be made, where can I read that?

1 A. I don't believe we have that.

2 Q. Now, looking at Exhibit 103 some more, I
3 guess in the interest of time I'm going to assume I can
4 -- I've actually gotten pretty good at reading your
5 writing.

6 A. It's not that bad, is it?

7 Q. My writing is so much worse that I can't
8 disagree with you.

9 Looking at the arrow here about two-thirds
10 down the page, it says yes to Canadian fill. Do you
11 see that?

12 A. I saw it earlier. I'm trying to find it
13 again.

14 Q. It's under the one that says seven years 401,
15 et cetera.

16 A. Oh, yes.

17 Q. You see where it says yes to Canadian fill?

18 A. Yes. I see that.

19 Q. I'm wondering why are we saying yes to
20 Canadian fill? What's that all about?

21 A. My recollection isn't as clear as I would
22 like it to be, but I believe that the way the August
23 version of the 401 was written it would not have
24 allowed for consideration of Canadian fill, and I
25 believe we were being asked to consider that if the

1 fill comes from Canada and it meets the criteria what's
2 it matter?

3 Q. What in the August 401 prevented use of
4 Canadian fill?

5 A. Well, I'd have to look. I believe that
6 something to do with -- without having the benefit of
7 looking through the document, my recollection is that
8 we had some reference to state-approved sites, and it
9 was that reference that would exclude from
10 consideration the Canadian fill.

11 Q. And the reference to state-approved sites was
12 in the certification because that provided another
13 level of protection, did it not, with regard to the
14 fill?

15 A. I believe it provided a minimal level of
16 protection. I think the real protection is in the 401
17 itself with regard to reporting requirements imposed on
18 the port with respect to when it can accept the fill,
19 and the reporting required an opportunity for us to
20 review documents before they accept fill. I believe
21 that the state certification is there for purposes of
22 what DOT can use at transportation sites or projects.

23 Q. But if I understand correctly, if it's a
24 state-approved site, that gives you a threshold level
25 of assurance that the site has arguably cleaner fill

1 than if it's not state approved; is that correct?

2 A. I believe that's correct.

3 Q. Now, is there any Canadian analogy that's
4 been required in the September 401 certification?

5 A. The acceptable fill criteria that we're
6 imposing on the port far exceeds what a state-certified
7 source would require. Therefore, if the Canadian fill
8 could -- the logic goes if the Canadian fill can pass
9 the higher standard of acceptable fill criteria for the
10 401, it therefore would exceed the requirements of a
11 state-certified source.

12 Q. But that logic would have applied in the
13 August 401 as well, wouldn't it have? The fill
14 criteria didn't change in that respect between the
15 August and September 401, did they?

16 A. I'll take a moment here to look at the August
17 document. I'm looking at E2A, fill sources. Fill
18 materials for proposed third runway embankment or other
19 master plan update projects shall be limited to the
20 following three sources: state-certified borrow sites,
21 contractor-certified construction sites, Port of
22 Seattle-owned properties. I believe that the concern
23 was that that would exempt or exclude from
24 consideration Canadian sources.

25 Q. And in doing the requirement in the August

1 401, what ecology was doing was saying that it wanted
2 sites about which it could obtain information at least
3 within the state; is that correct?

4 (Mr. Witek left the room.)

5 A. I don't remember. Now that I'm looking at
6 both documents, I'm not seeing a difference here in
7 fill source requirements. They look the same. I'm not
8 recalling -- I know that the port was in need of some
9 clarification with regard to whether or not they could
10 use Canadian fill.

11 Q. And your notes say yes to Canadian fill,
12 don't they?

13 A. They do. I would have to look at this
14 further, talk to staff, maybe the attorneys to improve
15 my understanding of the difference between the
16 documents.

17 Q. I'm actually almost at the back here of the
18 notebook, but I did want to ask you --

19 (Deposition Exhibit No. 104 was marked for
20 identification.)

21 Q. (BY MR. EGLICK) This is something that maybe
22 you can clear up. Looking at what's been marked
23 Exhibit 104 to your deposition.

24 A. This is an e-mail from myself to Tom
25 Fitzsimmons copied to other members of the senior

1 management team and Ann Kenny and Carol Jolly and the
2 governor's office policy staff, Sea-Tac third runway
3 certification. It's a northwest update.

4 Q. I'll just ask you a couple questions about
5 the background on this. At some point you reached
6 agreement with the port, and then to implement the
7 agreement -- when I say you, I mean ecology -- the port
8 filed an appeal, didn't it, of your August 401
9 certification?

10 A. That's correct.

11 Q. And then immediately the document settling
12 the appeal was also then made of record; is that right?

13 A. That's correct.

14 Q. So that was the mechanism that was hit upon
15 to attempt to change the 401 was to have an appeal and
16 then a settlement without rescinding the August 401; is
17 that right?

18 A. That was my understanding of it.

19 Q. And in the end, that didn't work out, did it?

20 A. What do you mean?

21 Q. You had to rescind the 401, didn't you?

22 A. I'm not remembering the details of the legal
23 process.

24 Q. Well, the 401 -- the August 401 ended up
25 being rescinded, didn't it?

1 A. I believe we needed to do that to make the --
 2 to then implement and then reissue it with the changes.
 3 Q. Now, how did you know what changes to make
 4 when you issued the September, the new modified 401?
 5 You had an agreement with the port, didn't you?
 6 A. We had an agreement, yes.
 7 Q. Now, was there a period of time then when
 8 there was no 401 certification?
 9 A. To my assumption, there would have been a
 10 brief period where there was not a certification.
 11 Q. And was there a new application submitted for
 12 a 401 certification?
 13 A. Not that I'm aware of.
 14 Q. So did the port come in with any document
 15 that said we hereby apply for a 401 certification with
 16 the following changes?
 17 A. Not that I'm aware of. My assumption is that
 18 the recension and reissuance was consistent with
 19 requirements of the board and the law.
 20 Q. And you remember when the 401 application was
 21 withdrawn by the port and then a new one was submitted
 22 back in September, October 2000?
 23 A. Yes.
 24 Q. And then there was a new public notice
 25 published, wasn't there?

1 A. Yes.
 2 (Mr. Witek returned.)
 3 Q. And a new comment period was run, wasn't
 4 there?
 5 A. Yes, sir.
 6 Q. Were there big changes between the
 7 application that was withdrawn and the one that was
 8 resubmitted or was it the same project?
 9 A. Same project with the expectation that there
 10 would be significant changes in submittals for the
 11 project to satisfy our requirements for stormwater
 12 management, et cetera.
 13 Q. Same project noticed, right --
 14 A. Yes.
 15 Q. -- for public comment?
 16 So was there any idea or thought given that
 17 after you had all these interactions with the port and
 18 with Paul Isaki and came to all these agreements about
 19 changing the August certification and then rescinding
 20 it and then issuing a new one in September that before
 21 that new certification was issued ecology should give
 22 public notice and ask for comments on the changes?
 23 A. I'm pausing. I'm reflecting back. My
 24 understanding, my recollection is that we didn't have a
 25 situation where we had significant enough or

1 substantive changes to the degree that it was necessary
 2 to go through a public process.
 3 Q. And in whose view were the changes not
 4 substantive enough?
 5 A. I don't know.
 6 Q. Did you even consider giving public notice
 7 and an opportunity for comment before issuing the
 8 modified 401 in September?
 9 A. I believe that my assumption was that with
 10 the reissuance and the continuance of the appeal or the
 11 reissuance of the appeal afforded the public the
 12 process it needed to challenge the 401.
 13 Q. Did ecology in the course of the how many
 14 years -- three or four years total review of the
 15 Sea-Tac project?
 16 A. Three and a half, four years.
 17 Q. -- receive hundreds, thousands of comments
 18 from members of the public?
 19 A. Well, scores of them.
 20 Q. You don't think it was hundreds?
 21 A. It may have been.
 22 Q. And were all those people who submitted
 23 comments parties to the one appeal that was filed of
 24 the August certification?
 25 A. I don't know. I don't know.

1 Q. Do you know who was the appellant?
 2 A. The Airport Communities Coalition --
 3 Q. Now --
 4 A. -- representing according to its agents
 5 hundreds of thousands of people in and around Sea-Tac
 6 airport.
 7 Q. Well, the Airport Communities Coalition is --
 8 do you know what it's composed of?
 9 A. Composed of City of Federal Way where I live,
 10 Des Moines, Burien, Normandy Park, Highline School
 11 District.
 12 Q. So it represents municipalities and a school
 13 district; is that right?
 14 A. Yes.
 15 Q. And did ecology receive comments from members
 16 of the public who, for example, didn't live in the ACC
 17 cities?
 18 A. Yes, we have.
 19 Q. Did those folks have any participation in the
 20 September modified certification?
 21 A. Not that I'm aware of.
 22 Q. Isn't it true that as a result of the
 23 September certification the scope of the 401 in its
 24 entirety was no longer coincident with the scope of the
 25 project described in the JARPA for which a public

1 notice had been issued back in the year 2000?

2 A. I wouldn't agree with that.

3 Q. Well, there were -- we've already agreed that
4 there were parts of what was described in the JARPA in
5 the year 2000 for which a public notice was issued that
6 were no longer automatically subject to the fill
7 criteria; isn't that correct?

8 A. I did.

9 Q. Did any member of the public have a chance to
10 comment on that change before it was implemented in the
11 modified 401?

12 A. No.

13 Q. Do you think public comment on that issue
14 would have been worthwhile?

15 A. Probably not.

16 Q. And is that because you know what the public
17 comment would have said?

18 A. No.

19 Q. Well, why would public comment, then, not be
20 worthwhile if comment from the port was?

21 A. The port had information to give us relating
22 to some projects that they felt it was reasonable for
23 us to consider as being exempt from the fill criteria.
24 We said we would do that. It seemed reasonable to do
25 that based on what was in front of us, based on the

1 port providing a list of projects to us that we would
2 still have to approve, wherein if we determined that
3 there was no threat, given that the major projects, the
4 embankment and the other major projects weren't being
5 exempted, but that it was possible -- accepting that it
6 was possible that fill for some other projects might
7 not cause risk, that it was reasonable to consider
8 that.

9 Q. Now, and your argument is that that
10 information from the port was appropriate to consider
11 but you didn't need to hear from the public on what the
12 port had to say; is that right?

13 A. I'm not sure I'm saying that. You asked a
14 question as to whether or not I thought it would make a
15 difference if we did, and I think my answer was that
16 probably not, but otherwise I'm just speculating.

17 Q. In other words, you don't know what the
18 public might have said that might have --

19 A. No, I don't.

20 Q. Now, the determination that you say is going
21 to be made later by ecology as to what's in and what's
22 out, let's say, for the acceptable fill criteria under
23 the September 401, do you know what I'm referring to?

24 A. Yes.

25 Q. Is that determination going to come in the

1 form of amendments to the 401 or in the form of
2 administrative decisions just between ecology and the
3 port?

4 A. My understanding is the 401 sets that up as
5 an administrative process.

6 Q. So that's not going to come in the form of
7 another modification to the 401; is that correct? Is
8 that your understanding?

9 A. That's my understanding. I'm reaching for
10 the 401 now. In the interest of time, I'm going
11 through here fairly rapidly, and I'm not identifying
12 right off where I see reference to this function we're
13 discussing where ecology makes its -- has an
14 opportunity to consider whether or not the fill should
15 apply to some projects.

16 Q. The fill criteria?

17 A. The fill criteria.

18 Q. So if this is an internal essentially
19 decision that ecology makes between itself and the
20 port, then that occurs after PCHB review, doesn't it,
21 and -- well, answer that.

22 A. That's my current understanding of the
23 approach.

24 (Deposition Exhibit No. 105 was marked for
25 identification.)

1 Q. (BY MR. EGLICK) Showing you what has been
2 marked as Exhibit 105 to your deposition. Do you
3 recognize and can you identify it?

4 A. This first document here is an e-mail from
5 Ann Kenny to Kevin Fitzpatrick, John Drabeck, Ed
6 Abbasi, Ray Hellwig, Joan Marchioro, Tom Young dated
7 October 23, 2001. It has several attachments to it.
8 This is criteria for your evaluation from the port re
9 fill criteria -- or for your evaluation from the port
10 re fill criteria. Please review and get back to me
11 with your comments. And there's several attachments.

12 Underneath that is the e-mail that was from
13 Elizabeth Leavitt at the port to Ann Kenny and myself
14 with copies to staff at the port. It's a follow-up to
15 the meeting you had a few weeks ago to begin discussion
16 on which projects and types of materials the fill
17 criteria conditions would apply to, et cetera.

18 So this is apparently getting at what we've
19 been discussing with regard to the process by which the
20 port would expect us to consider not applying the fill
21 criteria to some projects.

22 Q. As I understand it here, if we look on the
23 first page, let's see if we're tracking on this.
24 There's a quote what Leavitt is telling Ann and
25 yourself -- excuse me -- Ann Kenny and yourself.

1 Quote, we are proposing for your consideration that
2 topsoil utility backfill and base course not be subject
3 to fill criteria, end quote. Do you see that?

4 A. I was looking at the other pages. Tell me
5 again where that is.

6 Q. It's on the first page of Exhibit 105.

7 A. Okay.

8 Q. So is there anything -- if you were to just
9 look at the 401 certifications, is there anything in
10 there that says that you should anticipate these
11 exceptions are coming down the pike?

12 A. I was looking through the document as you
13 were introducing the next exhibit, and I didn't
14 identify it. I may have gone through this document too
15 fast.

16 Q. You were saying this starts the process we're
17 talking about, and I do see where Elizabeth Leavitt in
18 this e-mail says, quote, this e-mail follows up on the
19 meeting we had a few weeks ago to begin discussions on
20 which projects and types of materials the, quote, fill
21 criteria, quote, condition of the 401 might apply to,
22 end quote. But as you look at Exhibit 105 and as you
23 looked at it when you received it, is there anything in
24 here that talks about which projects are in and out?

25 A. Just a moment, please.

1 Q. Sure.

2 A. It could be jumping back a little bit that
3 the paragraph that starts off condition E, page 14 of
4 the certification, is what sets this up, but now I'm
5 jumping to this next exhibit here that you provided,
6 Exhibit 105, and you asked me if this -- if there's
7 anything in this document indicating a list of projects
8 that we might consider?

9 Q. Yeah. There's nothing in this Exhibit 105,
10 is there, that talks about which projects are in and
11 out under the fill criteria, is there?

12 A. I don't see it. It looks more like this is a
13 best management practice information and requirements
14 to govern how fill is used under certain circumstances,
15 but I don't see a list of projects, no.

16 Q. Actually, this is a proposal from the port,
17 isn't it, to have ecology agree that topsoil utility
18 backfill and base course, c-o-u-r-s-e, won't be subject
19 to fill criteria, isn't it? Look at the Leavitt e-mail
20 on the first page of exhibit --

21 A. Yeah. Apparently that's it. Apparently
22 that's correct.

23 Q. I'm down to my last two documents. Have you
24 had an opportunity to review the port's new low flow
25 plan? I believe it was submitted in December.

1 A. I have not seen it.

2 Q. Is there a process now going on within
3 ecology to determine whether or not that low flow plan
4 will be acceptable under the September certification?

5 A. We will have that document reviewed by our
6 consultant at King County, Kelly Whiting.

7 Q. Has any -- and I'll use this term advisedly
8 -- constraint been placed on the timing of that review?

9 A. There may be a constraint referred to in the
10 contract with the county. I know that the county
11 consultant, the individual functioning as our
12 consultant, has plenty of other work to do on behalf of
13 the county and is motivated to get through the analysis
14 expeditiously, but I'm not aware of a specific
15 constraint.

16 Q. Well, do you have any -- another term we've
17 used in this deposition -- any estimate of when the
18 review will be completed?

19 A. No.

20 Q. And when ecology will determine whether or
21 not the port's submission is in ecology's view
22 acceptable under the September certification?

23 A. I do not.

24 Q. Are any meetings scheduled to go over that
25 either internally or with the port?

1 A. My assumption is that meetings will be
2 arranged. I'm not aware that any have been arranged
3 yet.

4 Q. So as of right now, there's no approval by
5 ecology of the low flow plan that was submitted in
6 December; is that correct?

7 A. That's correct. We have not approved it.

8 Q. What if ecology never approved the port's low
9 flow plan and just said it's unacceptable and the port
10 didn't submit a better one?

11 A. My understanding is if the port does not
12 comply with the terms and conditions of the 401, then
13 we can rescind the 401.

14 Q. And so where the 401 requires submission of a
15 low flow plan by a date certain -- by the way, that
16 date was extended once already, wasn't it?

17 A. Yes.

18 Q. Anyway, where the 401 requires submission of
19 a low flow plan by a date certain, that's something
20 that is required to support the 401; is that correct?

21 A. That's correct. I believe that the way the
22 401 is written, if the port requests for additional
23 time and we think it's a reasonable request, we can
24 grant that.

25 Q. Now, if the 401 had not required an

1 additional submission, would there have been reasonable
2 assurance for its issuance?

3 MR. REAVIS: Submission of the low flow plan?

4 MR. EGLICK: That's right.

5 A. I'm retracing the events here.

6 Q. (BY MR. EGLICK) Would you like me to have her
7 read back the question?

8 A. No. That's all right. My recollection is
9 that the port asked us to consider this new
10 information. If the port had not asked that, then,
11 yes, we have reasonable assurance with the 401 as
12 written.

13 Q. But the 401 as written includes a condition,
14 does it not -- in fact, it's a lengthy condition or set
15 of conditions -- that requires submission of an
16 augmented or substitute -- pick your word, Mr. Hellwig
17 -- low flow plan; isn't that correct?

18 A. I believe a refined, more detailed plan.

19 Q. Could the 401 have been issued without that
20 condition and still have a reasonable assurance basis
21 as required under the Clean Water Act?

22 A. No. That was a necessary condition is my
23 understanding.

24 Q. And was the 401 then issued in anticipation
25 that when the low flow plan came in it would be

1 acceptable?

2 A. Yes.

3 Q. And the 401 was issued, was it not, in
4 September -- certification was issued in September fo
5 a certification process that had a deadline of the end
6 of December 2001; is that correct?

7 A. I would need to check. I believe that's
8 correct.

9 Q. So if ecology was in need of this augmented
10 or new or whatever word you want to use low flow plan,
11 why did ecology issue a certification in September that
12 depends on a plan to be submitted later when the
13 deadline for the ecology certification decision wasn't
14 until the end of December? In other words, why not
15 just wait until you had an acceptable plan in hand to
16 review?

17 A. We had analysis telling us what the impact
18 was and requirements in the 401 that the port would in
19 its plan account for that impact, and we had the
20 conceptual plan in front of us. We had all the other
21 requirements in the 401 where we wanted them. We had
22 reasonable assurance.

23 Q. Did you have reasonable assurance in
24 September with regard to the low flow plan as the
25 record stood when the September certification was

1 issued?

2 A. Yes.

3 Q. So whatever the port submits now, then, does
4 not matter?

5 A. No. It matters. It still has to satisfy our
6 ongoing requirements.

7 Q. Is there anything in the conditions that have
8 been imposed with regard to the low flow plan --

9 A. I'm sorry. I'm looking at that section of
10 the low flow plan now. Would you please repeat the
11 question?

12 Q. Do you need to have a minute to look at it
13 without me asking you a question?

14 A. No. Go ahead, and if I need to look, I'll
15 look.

16 Q. Is there anything in the September 401
17 certification with regard to the low flow plan that you
18 could do without, you being ecology?

19 A. I'm not aware of any element or piece off the
20 top of my head.

21 Q. So the deliverables, I guess isn't that one
22 term that's used in this context?

23 A. Yes.

24 Q. So the deliverables called for in the
25 September 401 are all in your understanding essential?

1 A. Yes.

2 Q. Just give me a minute to check my notes, but
3 I think I may be done. Do you know who Bob Barwin is?
4 I forgot to ask you that.

5 A. Yeah. He's a supervisor for the water
6 resources program central regional office. He's also
7 -- he was on the water quality program program
8 management team when I was with the water quality
9 program in the early '90s, and I know him fairly well.

10 Q. Because I'm looking at ecology's answers to
11 discovery, which we just received yesterday, and he was
12 the only name on there I didn't really recognize. It's
13 referring to a March 22, 2001, telephone call
14 discussing the port's proposal with regard to use of
15 water right or the need for water right for
16 implementation of flow mitigation, so why would Bob
17 Barwin be on a call like that?

18 A. Given his experience with the water resources
19 program, it was agreed -- I'm not sure who agreed to
20 it, but I was happy to have him on the call -- that
21 given his experience with the programs, it would be
22 helpful to have him consult with us on the water right
23 issue.

24 There was, for example, a situation in
25 eastern Washington where stormwater had been detained

1 and used in an industrial facility as a cleaning tower,
 2 and that was beneficial use that triggered a
 3 requirement for water right, and I believe that's one
 4 of the examples that folks from the east side of the
 5 mountains -- I don't know if it was Bob or not --
 6 wanted to make sure it was considered. Of course, it
 7 was sort of an apples and oranges situation with regard
 8 to what the port is proposing.

9 Q. So Bob Barwin was describing a situation that
 10 he'd encountered in the course of his work for ecology
 11 east of the mountains where someone had established a
 12 beneficial use without the benefit of a water right,
 13 and he was drawing an analogy to the situation with
 14 regard to the port proposal?

15 A. I don't believe he was drawing an analogy. I
 16 think he wanted to just put it out there for
 17 consideration. Actually, it might have happened in the
 18 eastern regional office. It might have been a Spokane
 19 office issue. But Bob would be aware of it. Bob has
 20 years of experience with both water resources and water
 21 quality, and I value his ideas and thinking, so I was
 22 glad to have him on the call.

23 Q. And did he opine as to whether or not the
 24 port should be required to obtain a water right?

25 A. Bob agreed with several other program staff

1 that the issue was in what I think some folks refer to
 2 as a gray zone under the law where it wasn't as clear
 3 as folks would prefer, but I think that he thought
 4 arguments could be made if I recall that a water right
 5 could be required.

6 Q. But I don't want to have you testifying as to
 7 what Bob thought. I want to ask you to testify as to
 8 what Bob said, unless when you say thought you meant
 9 said.

10 A. I think I did. Bob said as I recall -- this
 11 was some time ago, many months ago -- that it's a tough
 12 issue; that it's in the gray zone of the law; that we
 13 could win on that issue and we could lose on it, his
 14 opinion. It could go either way. My understanding of
 15 listening to Bob was that it was his opinion it would
 16 be appropriate to require the water right.

17 MR. EGLICK: I don't think I have anything
 18 else at this time. You guys can go ahead and ask your
 19 questions.

20 MS. MARCHIORO: That concludes the
 21 deposition.

22 MR. REAVIS: Given the hour, I think we'll
 23 not do that. I don't want to waive my right to ask
 24 questions at a later date, but I don't anticipate that
 25 will be necessary.

1 (Deposition concluded at 6:35 p.m.)
 2 (Signature was reserved.)
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1 CORRECTION & SIGNATURE PAGE
 2
 3 RE: ACC v. DOE; PCHB; 01-160
 4 Ray Hellwig; January 8, 2002
 5
 6 I, Ray Hellwig, have read the within transcript
 7 taken January 8, 2002, and the same is true and
 8 accurate except for any changes and/or corrections, if
 9 any, as follows:
 10 PAGE LINE CORRECTION
 11
 12
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 22 Signed at _____, Washington, on the
 23 _____ day of _____, 2002.
 24 _____
 25 Ray Hellwig

C E R T I F I C A T E

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I, Mary L. Green, the undersigned Certified Court Reporter and Notary Public, do hereby certify:

That the testimony and/or proceedings, a transcript of which is attached, was given before me at the time and place stated therein; that any and/or all witness(es) were by me duly sworn to tell the truth; that the sworn testimony and/or proceedings were by me stenographically recorded and transcribed under my supervision to the best of my ability; that the foregoing transcript contains a full, true, and accurate record of all the sworn testimony and/or proceedings given and occurring at the time and place stated in the transcript; that I am in no way related to any party to the matter, nor to any counsel, nor do I have any financial interest in the event of the cause.

WITNESS MY HAND AND SEAL THIS 9TH DAY OF JANUARY 2002.

MARY L. GREEN, CSR #GREENML497RZ
Notary Public for the State of Washington,
residing in King County.
My appointment expires 4/4/05.

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