

KENNY, ANN

AR 028686.01

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: Ann Kenny, Department of Ecology Federal Permit Coordinator for the Northwest Regional Office.

Date of Deposition: December 20, 2001 and February 20, 2002

1. Admissibility

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

Ann Kenny coordinated the review of the Port's application for 401 certification by Department of Ecology technical staff and made a recommendation of reasonable assurance to Gordon White. Excerpts of Ms. Kenny's deposition are offered to prove that Ecology lacks reasonable assurance with respect to wetlands mitigation, stormwater management and mitigation, low flow analysis and mitigation and the fill criteria.

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

Ms. Kenny's deposition is offered pursuant to CR 30(b)(6) and designated on the following areas:

1. wetlands and wetlands mitigation;
2. stormwater and stormwater mitigation;
3. stream flow analysis and mitigation; and
4. fill criteria.

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 Kenny deposition are offered by ACC and CASE:

Page 5, line 18 through page 15, line 9
Page 19, line 7 through page 24, line 16
Page 25, line 12 through page 35, line 10

Page 37, line 1 through page 43, line 8
Page 47, line 23 through page 48 line 20
Page 71, line 9 through page 75, line 16
Page 77, line 21 through line 23
Page 85, line 3 through page 87, line 5
Page 89, line 11 through line 21
Page 93, line 23 through page 99, line 3
Page 107, line 5 through page 108 line 9
Page 109, line 24 through page 168, line 20
Page 174, line 10 through page 189, line 1
Page 195, line 11 through page 209, line 25
Page 213, line 14 through page 215 line 24
Page 225, line 22 through page 232, line 18
Page 236, line 17 through page 271, line 1
Page 273, line 8 through page 308, line 4
Page 311, line 6 through page 323, line 22

3. Counter Provisions of Respondents: See attached.

4. Objections of Respondents: See attached.

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AR 028688

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: **Ann Kenny**

Dates of Deposition: **December 20, 2001 and February 20, 2002**

3. Counter Excerpts by Respondent Department of Ecology:¹

<u>START</u>	<u>END</u>
Page 15, line 10	page 19, line 6
Page 43, line 10	page 43, line 24
Page 44, line 23	page 46, line 8
Page 61, line 4	page 71, line 5
Page 75, line 25	page 77, line 17
Page 78, line 8	page 82, line 24
Page 87, line 6	page 89, line 10
Page 99, line 4	page 101, line 9
Page 108, line 10	page 109, line 16
Page 172, line 13	page 174, line 4
Page 222, line 24	page 223, line 8
Page 224, line 17	page 225, line 21
Page 234, line 19	page 234, line 24
Page 271, line 2	page 273, line 7
Page 308, line 22	page 311, line 3
Page 190 (Complete Correction and Signature page)	

4. Objections to Designations by Appellants:

A deposition is admissible in this hearing only to the extent that the same testimony would be admissible in this hearing if the deponent were then present and testifying as a witness.

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

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: Ms. Kenny has testified in this matter and Ecology has not had the opportunity to review the hearing transcript. Ms. Kenny's deposition was used during her testimony. To the extent ACC and CASE now designate those portions of the deposition referenced during her testimony, Ecology objects to those portions of the transcript as asked and answered.

<u>START</u>	<u>END</u>	<u>OBJECTION</u>
Page 27, line 24	page 35, line 10	Relevance. Testimony relates to whether witness or others were under any pressure from Governor's Office or others to issue the 401 certification. None of the testimony is helpful or relevant to the factual or legal issues before the PCHB.
Page 28, line 12	page 28, line 18	Vague.
Page 38, line 1	page 39, line 13	Relevance. The testimony has no relevance to the factual or legal issues before the Board. Testimony regarding whether the witness has ever been to the Governor's office before and whether Mick Dinsmore was agitated or angry at this meeting.
Page 71, line 19	page 71, line 24	Asked and answered.
Page 77, line 21	page 77, line 23	Relevance. Whether the Port paid for a facilitator for a meeting is irrelevant to the factual and legal issues before the PCHB.
Page 110, line 23	page 111, line 6	Legal conclusion.
Page 114 line 13	page 115, line 5	Speculation.
Page 126, line 16	page 126, line 24	Vague.
Page 128, line 18	page 128, line 24	Legal conclusion.
Page 131, line 5	page 131, line 7	Vague.
Page 134, line 3	page 134, line 8	Legal conclusion.
Page 139, line 25	page 140, line 12	Calls for a legal conclusion.
Page 141, line 5	page 141, line 15	Calls for a legal conclusion.
Page 143, line 10	page 143, line 23	Calls for a legal conclusion.
Page 144, line 16	page 144, line 23	Calls for a legal conclusion.
Page 150, line 2	page 150, line 16	Calls for a legal conclusion.
Page 176, line 15	page 176, line 19	Lack of foundation or personal knowledge.

Page 240, line 22
Page 242, line 2
Page 248, line 7
Page 253, line 16

page 241, line 9
page 243, line 11
page 250, line 17
page 254, line 25

Relevance. ACC has stated that it has withdrawn any contention with respect to compliance with the Clean Air Act. In addition, the Board has previously granted summary judgment in favor of Respondents on the issue of SEPA compliance. The Port's proposed MPU projects do not fall within the jurisdiction of the Shoreline Management Act. Accordingly, the only remaining issue under the CZMA is water quality.

Page 312, line 24

page 313, line 4

Lack of foundation.

PORT JOINS ECOLOGY'S DESIGNATIONS AND OBJECTIONS

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

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

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

Deponent: Ann Kenny, Department of Ecology Federal Permit Coordinator for the
Northwest Regional Office

Date of Deposition: December 20, 2001 and February 20, 2002

ACC's Responses to Ecology Objections:

1. **General Objection:** Ecology makes a general "asked and answered" objection arguing that portions of Ms. Kenny's deposition were used at the hearing for impeachment purposes. **Response:** The objection is nonsensical. Use of a deposition at trial for impeachment purposes or to refresh the recollection of a witness is not a basis upon which to raise an objection upon publication of the deposition that the question has been "asked and answered." If this were a valid objection, then the deposition could never be published for impeachment purposes. Pursuant to the Board's Order on the motion to publish and CR 32(a)(2), ACC is entitled to use Ms. Kenny's sworn deposition testimony as a CR 30(b)(6) designee "for any purpose."

2. Page 27, line 24 through page 35, line 10 (objection: relevance relating to contacts with Governor's Office). **Response:** See, ACC's response to objections regarding contacts with Governor's Office in responses to objections raised to the depositions of Tom Fitzsimmons and Ray Hellwig (Response to General Objection to "Section 3" at pp. 2-5 of Appellants' Responses to Objections to Fitzsimmons Deposition; Response to General Objections at pp. 1-3 of Appellants' Responses to Objections to Hellwig Deposition).

3. Page 28, line 12 through page 28, line 18 (objection: vague). **Response:** Ms. Kenny was asked whether she sensed increasing pressure to issue the 401 certification. There is nothing vague about a question that uses commonly understood words. Ms. Kenny answered the question without hesitation and in a way that establishes she understood the question.

4. Page 38, line 1 through page 39, line 13 (objection: relevance relating to meeting in Governor's Office between Governor's staff, Ecology and the Port). **Response:** See, ACC's response to objections regarding contacts with Governor's Office in responses to objections raised to the depositions of Tom Fitzsimmons and Ray Hellwig (Response to General Objection to "Section 3" at pp. 2-5 of Appellants' Responses to Objections to Fitzsimmons Deposition; Response to General Objections at pp. 1-3 of Appellants' Responses to Objections to Hellwig Deposition).

5. Page 71, line 19 through page 71, line 24 (objection: asked and answered). **Response:** Ms. Kenny was asked whether she was any more of an expert with respect to 401 issues than Mr. Tom Luster. Ms. Kenny answered that she was not. For purposes of clarification and to make sure that Ms. Kenny was not claiming to have the same level of expertise as Mr. Luster, the question was rephrased affirmatively to elicit that she was not more of an expert than Mr. Luster on 401 issues.

6. Page 77, line 21 through page 77, line 23 (objection: relevance relating to Port-paid facilitator). **Response:** At the hearing, Ecology repeatedly touted the facilitation meetings as evidence that Ecology conducted an independent and thorough review of the Port's application. That the facilitator, Floyd & Snider, are environmental consultants routinely retained by the Port on other matters and who were retained and paid by the Port here to conduct "facilitation" meetings with Ecology is directly relevant to the issue of whether the meetings provided an opportunity for critical assessment of project components or whether the meetings were used by the Port to hammer out differences with Ecology and avoid the public process as changes were made to the project.

7. Page 110 line 23 through page 111, line 6 (objection: legal conclusion). **Response:** In the answer immediately preceding the question to which Ecology has objected, Ms. Kenny explained that the reference to "related projects" in the 401 certification referred to "those projects identified in the Port's JARPA where Ecology has jurisdiction." The subsequent question asked Ms. Kenny whether Ecology has jurisdiction over all of the projects identified in the Port's JARPA. The question sought Ms. Kenny's understanding as the author of the 401 certification and Ecology's Federal Permit Coordinator for the project and did not call for a legal conclusion.

8. Page 114, line 13 through page 115, line 5 (objection: speculation). **Response:** In its cover letter to the 401 certification, the Department of Ecology advises the Port that the certification will be withdrawn "if the project is revised in such a manner or purpose" that Ecology determines the revised project must obtain new authorization and public notice." The question simply asked Ms. Kenny as the author of the letter what type of change to the project's manner or purpose would result in Ecology withdrawing the certification. Ms. Kenny agreed that if the Port decides to proceed with a regional detention facility for stormwater management, then new public notice would be required.

9. Page 126, line 16 through page 126, line 24 (objection: vague). **Response:** After testifying that the 401 certification is subject to conditions of Hydraulic Project Approval ("HPA"), Ms. Kenny was asked whether the conditions in the HPA were needed in order to have reasonable assurance. There is nothing vague about the question and Ms. Kenny was able to answer the question stating that the conditions in the HPA are "complementary" to the conditions in the 401 certification.

10. Page 128, line 18 through page 128, line 24 (objection: legal conclusion). **Response:** Ms. Kenny was asked whether the Port will be in violation of the 401 certification if the Port fails to comply with the HPA. Ms. Kenny evaded the question by stating that the requirement to obtain HPA permit was in the cover letter to the 401 certification and that she thought it was a “legal issue” whether the cover letter was part of the 401 certification. As the Federal Permit Coordinator for the project, Ms. Kenny can interpret for the Department of Ecology whether the Port would be in violation of the 401 if the Port fails to obtain an HPA for in-stream work. The question does not call for a legal conclusion.

11. Page 131, line 5 through page 131, line 7 (objection: vague). **Response:** ACC withdraws this portion of the designation.

12. Page 134, line 3 through page 134, line 8 (objection: legal conclusion). **Response:** Ms. Kenny was asked whether the groundwater quality criteria contained in WAC 173-200 *et seq.* are part of the state water quality standards and whether in coming to a reasonable assurance determination, Ecology considered the groundwater quality criteria. The question sought Ms. Kenny’s testimony in this regard as Ecology’s CR 30(b)(6) designee and as Ecology’s Federal Permit Coordinator who reviewed the Port’s application and who came to the conclusion that Ecology had reasonable assurance that the project would not violate state water quality standards. The question does not seek a legal conclusion but seeks information relating to whether Ecology took the groundwater quality criteria into consideration. At the hearing Ecology failed to rebut ACC’s evidence that contaminants leaching from the embankment will contaminate the groundwater.

13. Page 139, line 25 through page 140, line 12 (objection: legal conclusion). **Response:** Ms. Kenny was asked whether WAC 173-201A-100 relating to mixing zones applies to the 401 certification. The question sought Ms. Kenny’s understanding as the Federal Permit Coordinator responsible for reviewing the Port’s application as to the applicability of Ecology’s mixing zones regulations. As Ms. Kenny testified in her deposition at page 138 and as she admitted at the hearing, there is “a likelihood” that mixing zones will occur as a result of the scope of construction on the project. As Ms. Kenny also admitted in her deposition (p.140) and at the hearing, Ecology did not perform any sort of review and approval of mixing zones as part of Ecology’s reasonable assurance review. The question was meant to elicit information from Ecology’s Federal Permit Coordinator whether Ecology applied its mixing zone regulations in the context of the 401.

14. Page 141, line 5 through page 141, line 15 (objection: legal conclusion). **Response:** Ms. Kenny was asked whether it was her understanding that the Clean Water Act and state water quality standards apply to long-term operation of the facility. After stating that it was her understanding that the Act and state water quality standards apply to long-term operation, Ms. Kenny agreed (p. 148, line 18-21) that the deletion of that language from the August 401 certification resulted in a lesser standard in the September 401 certification. Ms. Kenny authored both certifications

and was involved in the revisions. The questions clearly asked for her understanding and did not ask her to draw a legal conclusion. The questions were proper.

15. Page 143, line 10 through page 143, line 23 (objection: legal conclusion). **Response:** Ms. Kenny was asked why she included in the August 401 certification the language that the “Order shall be valid during construction and long-term operation and maintenance of the project.” Given the last part of this phrase is deleted in the September certification, the question properly explored the basis for including the entire phrase in the August certification. Ms. Kenny correctly answered that the language is from the Clean Water Act and that is the reason Ecology had the provision in the August certification. The question does not call for a legal conclusion but merely seeks Ms. Kenny’s understanding as the author why the phrase was included in the August certification.

16. Page 144, line 16 through page 144, line 23 (objection: legal conclusion). **Response:** The questioning continues to explore properly Ms. Kenny’s understanding that the Clean Water Act requirements apply to long-term operation and maintenance of the facility and the reason why Ecology deleted the provision in the September 401 certification. Ms. Kenny bluntly admitted that Ecology eliminated the provision because the Port asked Ecology to delete it despite Ecology and Ms. Kenny’s understanding as the Federal Permit Coordinator of the requirements of the Clean Water Act. The question merely sought the basis for deleting the provision and did not call for a legal conclusion.

17. Page 150, line 2 through page 150, line 16 (objection: legal conclusion). **Response:** The question to which Ecology objects relates to Ecology’s interpretation of Condition B.1.f. of the September 401 certification, which provides that the current 401 certification can be amended by a future, NPDES permit. Ms. Kenny agreed in response to the question that future modifications of the 401 through an NPDES permit could result in lesser protection of water quality than provided by the current 401. The question does not call for a legal conclusion but rather Ecology and Ms. Kenny’s interpretation of the 401 certification that she drafted and Ecology issued. Ms. Kenny expressed her understanding of the requirements of the 401. The question was a proper question.

18. Page 176, line 15 through page 176, line 19 (objection: lack of foundation or personal knowledge). **Response:** ACC withdraws this portion of the designation.

19. Page 240, line 22 through page 241, line 9 (objection: relevance of SEPA issues). **Response:** ACC withdraws this portion of the designation.

20. Page 242, line 2 through page 243, line 11 (objection: relevance of SEPA issues). **Response:** ACC withdraws this portion of the designation.

21. Page 248, line 7 through page 250, line 17 (objection: relevance of SEPA issues). **Response:** ACC withdraws this portion of the designation.

22. Page 253, line 16 through page 254, line 25 (objection: relevance of SEPA issues). **Response:** ACC withdraws this portion of the designation.

23. Page 312, line 24 through page 313, line 4 (objection: lack of foundation). **Response:** On August 3, 2001, one week prior to Ecology issuing the 401 certification and contemporaneous with Ann Kenny advising Gordon White that she had reasonable assurance that the project would not result in a violation of state water quality standards, King County reviewer Kelly Whiting was advising Ms. Kenny in writing that the Port's Comprehensive Stormwater Management Plan "could easily be challenged as not being AKART" and that "King County's Surface Water Design Manual is not AKART." Ms. Kenny was asked whether this is what Kelly Whiting wrote to Ms. Kenny. Ecology objects to the question for lack of foundation. However, foundation for the question was clearly laid at page 311, lines 6-12, where Ms. Kenny identified Exhibit 451 as a fax that Kelly Whiting sent to Ms. Kenny on August 3, 2001. Ms. Kenny also testified (p. 312, lines 15-18 and p. 313, lines 3-4) that she believed the fax contained Kelly Whiting's comments in response to Ms. Kenny's draft 401 certification and that Mr. Whiting wrote the sentences. Ecology's objection to the question on the grounds that no foundation was laid ignores Ms. Kenny's own testimony that Mr. Whiting made the statements.

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AR 028696

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**DEPOSITION UNDER
ORAL EXAMINATION OF**

ANN KENNY

DECEMBER 20, 2001

**AIRPORT COMMUNITIES COALITION
VS.
STATE OF WASHINGTON, et al.**

DIANE MILLS, CCR, RMR, CRR

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AR 028697

CORRECTION & SIGNATURE PAGE

ORIGINAL

RE: AIRPORT COMMUNITIES COALITION VS. STATE OF WASHINGTON, et al. BEFORE THE POLLUTION CONTROL HEARINGS BOARD DEPOSITION OF: ANN KENNY; DECEMBER 20, 2001

I, ANN KENNY, have read the within transcript taken DECEMBER 20, 2001, and the same is true and accurate except for any changes and/or corrections, if any, as follows:

PAGE	LINE	CORRECTION
8	19	"Where" to "When"
41	23	"Eric" to "Erik"
43	17	"Eric" to "Erik"
48	7	"Eric" to "Erik"
52	11	"Divitt" to "Devitt"
58	7	"Divitt" to "Devitt"
58	9	"D-i-v-i-t-t" to "D-e-v-i-t-t"
68	22	"Eric" to "Erik"
118	23	"Divitt" to "Devitt"
132	12	"ACART" to "AKART"
132	15	"ACART" to "AKART"
132	21	"ACART" to "AKART"
133	1	"ACART" to "AKART"
163	21	"Eric" to "Erik"
171	7	"Eric" to "Erik"

Signed at BelleVue, Washington, on the 22nd day of January, 2001. 2002

Ann E. Kenny
ANN KENNY

AR 028698

1 POLLUTION CONTROL HEARINGS BOARD
2 FOR THE STATE OF WASHINGTON

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

11
12 DEPOSITION UPON ORAL EXAMINATION
13 OF
14 ANN KENNY

15
16
17 9:00 A.M.
18 DECEMBER 20, 2001
19 1325 FOURTH AVENUE, SUITE 1700
20 SEATTLE, WASHINGTON

21
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23
24
25 DIANE MILLS, CSR# MI-LL-SD-M380N3

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I N D E X

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3 EXAMINATION BY: PAGE:
4 MR. STOCK

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13 EXHIBITS FOR IDENTIFICATION PAGE
14 70 - E-mail correspondence 92
15 71 - E-mail w/attached preliminary 401 WQC 101
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1 A P P E A R A N C E S

2
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23 Suite 2200
24 Seattle, Washington 98101
25

1 SEATTLE, WASHINGTON; DECEMBER 20, 2001
2 9:00 A.M.
3 --oOo--
4

5 ANN KENNY,
6 sworn as a witness by the Notary Public,
7 testified as follows:
8

9 EXAMINATION

10
11 BY MR. STOCK:
12 Q. Good morning.
13 A. Good morning.
14 Q. Could you state your name for the record,
15 please.
16 A. My name is Ann Kenny.
17 Q. And, Ms. Kenny, what is your residential
18 address?
19 A. 2109 - 168th Avenue Northeast, Bellevue,
20 Washington.
21 Q. Have you ever had your deposition taken
22 before?
23 A. No.
24 Q. This is the first time?
25 A. Yes.

1 Q. You understand that I'm going to be asking
2 you questions and you are required to answer the
3 questions unless the Department of Ecology's attorney
4 instructs you not to answer the question?

5 A. I do.

6 Q. If at any time you want to take a break
7 either to use the restroom or to talk to Ms. Marchioro,
8 please speak up and we'll accommodate that. Also, if I
9 ask a question that you don't understand or don't hear,
10 will you ask me to repeat it?

11 A. Yes.

12 Q. And do you understand you're under oath?

13 A. I do.

14 Q. And what does the oath mean to you?

15 A. That I've sworn to tell the truth.

16 Q. And you plan to do that today; is that right?

17 A. I do.

18 Q. Let's start out by having you give us a
19 thumbnail sketch of your educational background.

20 A. I have a bachelor's degree in political
21 science from Montana State University and a master's
22 degree in public administration from the University of
23 Washington.

24 Q. What year did you get your bachelor's in
25 political science?

1 A. 1980.

2 Q. What year did you get your master's in public
3 administration?

4 A. 1990.

5 Q. And that was from WSU?

6 A. No, that was -- the master's degree was from
7 the University of Washington.

8 Q. Since graduating -- what did you do between
9 the time that you graduated with your bachelor's and
10 the time that you went back to school to get your MPA?

11 A. I spent one year in law school at the
12 University of Montana School of Law. I successfully
13 completed that year and then I decided I didn't want to
14 continue in that vein. And so I came back to my
15 hometown of Helena and I worked for a year as a long-
16 distance operator for Ma Bell before she was broke up.

17 And then I went to work for three years for
18 the Montana Department of Revenue as a paralegal; that
19 was about 1982 to 1985. And then in 1985 I moved out
20 to Seattle where I worked as a freelance paralegal for
21 several years, and then I went back to school at the
22 University of Washington.

23 Q. What types of things did you do here in
24 Seattle as a paralegal?

25 A. My first assignment out here was with the

1 King County Prosecuting Attorney's Office. I worked as
2 a paralegal helping represent the King County Solid
3 Waste Division in a lawsuit involving the Cedar Hills
4 Landfill. And that was primarily Clean Water Act and
5 RCRA concerns as well as -- so we went to U.S. District
6 Court. And there was a separate case, it was more of a
7 property claim taking issue, that went to State
8 Superior Court. And then I worked on bankruptcy cases
9 and various sundry assignments for different law firms.

10 Q. What led you to get your MPA?

11 A. Well, I originally went back to the
12 University of Washington to pursue a Ph.D. in political
13 science, but after being in that program for a year I
14 decided it would be more practical to get a master's
15 degree in public administration. And I wanted to go
16 back to public service; I had enjoyed my time in
17 working with the State of Montana.

18 Q. You say 1990 you graduated with your MPA?

19 A. Yes, I did.

20 Q. What did you do after you graduated?

21 A. I went almost immediately to work. I
22 graduated in June and I went to work in September for
23 the Department of Ecology.

24 Q. Why don't you march through your positions
25 with the Department of Ecology. Just give me the

1 positions and then we'll go back and you can explain
2 what you did with each one.

3 A. My first position there was as an Away With
4 Waste educational instructor. That was an educational
5 program for schools, K through 12.

6 My second position was as the moderate risk
7 waste coordinator where I worked with issues related to
8 household hazardous waste and small quantity generator
9 waste.

10 From that position I moved into a toxics
11 reduction planner position which was working with
12 generators of hazardous waste who were required under
13 state law to prepare toxics reduction plans.

14 From that position I went to the Shorelands
15 and Water Resources Program where I worked as a
16 shoreline permit reviewer.

17 Q. What year was this?

18 A. 1996. I worked in that position until
19 February of 1998 where I took on the regional position
20 of a federal permit coordinator working on Section 401
21 water quality certifications.

22 Q. What types of permits were you involved with
23 when you were in the Shorelands and Environmental
24 Systems Program relating to the water permits in 1996?
25 Tell me again the position you held.

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Due to a clerical error this
number has been omitted.

AR 028701

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1 A. Shoreline permit reviewer.
 2 Q. And what permits were you involved with?
 3 A. Those were permits that are required under
 4 the Shoreline Management Act.
 5 Q. What standards did you use to determine
 6 whether a permit was issued in that case?
 7 A. In that case the standards -- depending on
 8 the type of permit issued by local government, if the
 9 permit was a substantial development permit, Ecology
 10 has the authority to review it for compliance with the
 11 local Shoreline Master Program. So we would review it
 12 and determine if it was in compliance with its
 13 shoreline master plan. If so, we would write a letter
 14 basically of verification.
 15 There are two other kinds of permits where
 16 Ecology had more review authority, the first being a
 17 conditional use permit. And then in that case we could
 18 look at that permit and attach additional conditions to
 19 the permit or deny the permit if we felt that it was
 20 not in compliance with the Shoreline Master Program or
 21 that the environmental impacts of that project had not
 22 been suitably mitigated.
 23 The third kind of permit was for variance,
 24 and that's a variance from the local planning codes and
 25 the Shoreline Master Program. And it's the same setup

1 shoreline there.
 2 Q. How much time did you spend on the H&H
 3 Properties project?
 4 A. Altogether it spanned a period of about six
 5 months, and intensively two months, before we made our
 6 permit decision.
 7 Q. Were you the lead permit coordinator on that
 8 project?
 9 A. I was.
 10 Q. Did you sign the permit?
 11 A. I did not sign the permit. That was signed
 12 by the Regional Shoreland Program section head.
 13 Q. Who was that at the time?
 14 A. That would have been Ray Hellwig.
 15 Q. So in 1998 you became the federal permit
 16 coordinator?
 17 A. That's correct.
 18 Q. And is that the position you hold today?
 19 A. No, it is not.
 20 Q. How long were you the federal permit
 21 coordinator?
 22 A. From February of 1998 to the end of July
 23 1999.
 24 Q. And in July 1999 what position did you take?
 25 A. I moved into a promotional opportunity which

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1 where Ecology could approve, approve with conditions,
 2 or deny.
 3 Q. What was the largest project that you worked
 4 on during the time that you were reviewing shoreline
 5 permits?
 6 A. I would say the one that I spent the most
 7 time on was a large development up in Island County
 8 being proposed by a development company on a land spit,
 9 basically sand area, for development into homes.
 10 Q. Do you remember the name of the project?
 11 A. H&H Properties on Deer Lagoon.
 12 Q. Can you give me a sense of the size of the
 13 project using any sort of measure you want?
 14 A. I don't recall the exact acreages involved.
 15 There were basically four to six lots. They would have
 16 been multi-million-dollar lots, being shorefront
 17 property. On the north side of the sand spit was a
 18 large freshwater wetland complex, and on the other
 19 side, part of the property was an emergent wetland.
 20 And those were some of the substantive issues
 21 that we worked with to clearly define the wetland
 22 boundaries and to establish conditions on the permit
 23 that were protective of the environment that would
 24 allow for the development of the homes without
 25 adversely impacting the native vegetation of the

1 was a newly-created regional position for the Permit
 2 Assistance Center.
 3 Q. Was the position created especially for you?
 4 A. No, it was not.
 5 Q. And what was your job title?
 6 A. Senior permit specialist.
 7 Q. And how long were you in this position for
 8 the Permit Assistance Center?
 9 A. I worked in that position from the beginning
 10 of August 1999 until about the end of October.
 11 Q. 2000?
 12 A. 2000, when I took on responsibilities for the
 13 401 permitting for the Sea-Tac Third Runway Project.
 14 Q. Was there a change in your job title in
 15 October 2000?
 16 A. I basically was put on loan to the project by
 17 my program so there was no change to my title or my job
 18 classification.
 19 Q. Just change in responsibilities?
 20 A. A change in responsibilities.
 21 Q. Let's go back to the period February '98 to
 22 July '99, and explain to me what your responsibility
 23 were as federal permit coordinator.
 24 A. My primary responsibilities in that job were
 25 to process and administer applications for Section 401

1 water quality certifications, along which always come
2 an application for coastal zone management consistency
3 determination. I also reviewed numerous applications
4 or reviewed nationwide permits issued by the Corps of
5 Engineers. I reviewed Section 10 applications to the
6 Corps.

7 And my primary role in the review of that
8 workload was to coordinate review by technical experts
9 in our program and to write 401 certifications, if
10 that's what was called for, or to issue letters of
11 verification for various actions that the Corps took or
12 to issue coastal zone management consistency
13 determinations.

14 Q. What percent of your time while you were the
15 federal permit coordinator did you spend coordinating
16 review of 401 applications?

17 A. 75 percent probably.

18 Q. What was the largest project that you worked
19 on as the federal permit coordinator?

20 A. The largest project that I worked on and the
21 most intensively was a project that was not yet before
22 the Corps of Engineers for review, but certainly we
23 spent many, many hours in meetings and site visits, and
24 that was the Sound Transit proposal for the commuter
25 rail from Seattle to Everett.

1 the project is right now, but it was approximately a
2 540-acre restoration project that would take wetlands
3 and -- well, they were now freshwater wetlands, and
4 remove dikes from the area and restore that area to
5 intertidal influence.

6 Q. During the time that you were the federal
7 permit coordinator, what was the largest development
8 project that you worked on that a JARPA had been
9 submitted?

10 A. Without checking my records, my recollection
11 is there were several large development projects. One
12 was the East Village project out in Issaquah which was
13 a residential development on the west side of Issaquah
14 for I think it was a 300-acre site. I can't remember
15 how many homes were being located there.

16 Q. How many acres of wetlands were impacted?

17 A. I don't recall.

18 Q. Ballpark estimate?

19 A. What I recall about that project was there
20 were a number of wetlands but they had done a fairly
21 good job of minimizing the actual impact to the
22 wetlands. And they had set aside quite a large acreage
23 of the wetland area in the way they had designed the
24 development to avoid -- so they avoided the impact to
25 the wetlands. So the actual impact number was two or

1 Q. Had Sound Transit made an application for a
2 401 certification?

3 A. They were involved in a pre-application
4 process with the Corps of Engineers, which is typical
5 for a large project. The Corps hosted meetings with
6 the applicant and other regulatory agencies to try to
7 get that project to the point where they could submit a
8 JARPA form, J-A-R-P-A, Joint Aquatic Resource Permit
9 Application, to the Corps which would commence the
10 formal process for both the 404 application and the 401
11 application.

12 Q. During the time that you were the federal
13 permit coordinator, was a JARPA submitted on the
14 Seattle to Everett run by Sound Transit?

15 A. They have never yet submitted a JARPA for
16 that particular project.

17 Q. During the time that you were the federal
18 permit coordinator, what is the largest project that
19 you worked on on which a JARPA had been submitted?

20 A. In terms of impact acreage, I would say the
21 largest project was a project in Skagit County that the
22 Corps of Engineers was proposing to restore habitat,
23 intertidal habitat, to an area adjacent to the Skagit
24 River not far from Fir Island.

25 And it's escaping me exactly what the name of

1 three acres.

2 Q. You were going to tell me about another
3 development project, several, one being the East
4 Village in Issaquah. What others did you work on of
5 some significance?

6 A. Well, another project that I worked on not
7 during my tenure as the 401 permit coordinator but
8 another special assignment while I was in the PAC
9 position was the Sumas Energy 2.

10 Q. This was after July 1999?

11 A. Right.

12 Q. Sumas Energy?

13 A. Sumas Energy 2. That's a cogeneration
14 facility proposed up in Whatcom County under the
15 jurisdiction of EFSEC, E-F-S-E-C, the Energy Facilities
16 Site Evaluation Council. That project sat on an area
17 of 40 to 42 acres, and the project would have impacted
18 about 35 acres of that site.

19 Q. Was the 401 certification issued on the Sumas
20 Energy 2 project?

21 A. In that circumstance, jurisdiction for the
22 401 certification was held by the EFSEC Council.
23 Ecology was hired as a contractor to EFSEC to prepare
24 recommendations and conditions that would be
25 incorporated into the Site Certification Agreement or

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17

1 whatever the document is that EFSEC prepares when they
2 issue their permits to the applicant.

3 Q. Was this Site Certification Agreement
4 something that the Corps needed in order to assure a
5 404 permit on that project?

6 A. I can't say with certainty, but the law that
7 EFSEC operates under their authority supersedes
8 Ecology's authority for 401. So I would assume, I
9 don't know, I would assume that when EFSEC issues their
10 Site Certification Agreement, that that would be
11 sufficient for the Corps to say that the State of
12 Washington has found that this project is -- they have
13 reasonable assurance the project will not adversely
14 impact water quality.

15 Q. Well, that was my next question. Did you
16 have to come to a conclusion of reasonable assurance on
17 this Sumas Energy 2 project?

18 A. We never got that far in the process.

19 Q. Why not?

20 A. Because the EFSEC Council issued a decision
21 basically to deny the application. We didn't complete
22 our work in that project.

23 Q. Any other projects of significance that
24 you've worked on other than the Third Runway project
25 where a JARPA had been submitted?

18

1 A. Right. I've worked on several -- actually,
2 three different golf courses which involved quite a bit
3 of acreage; one up in Whatcom County, the Willows Run
4 golf course outside of Redmond, and then another one.
5 There were several large -- there was one large
6 development in an industrial kind of area up in Whatcom
7 County. I didn't bring my whole list of projects from
8 that era of my career, but a number of large projects
9 with a variety of concerns and issues.

10 Q. Is Sea-Tac the largest project you've worked
11 on in terms of impact to wetlands?

12 A. No.

13 Q. What is?

14 A. The Sound Transit project that we worked on
15 as a pre-application project. Although it wasn't quite
16 wetlands, it originally started out as an impact of 35
17 acres of intertidal habitat.

18 Q. You didn't have to come to a reasonable
19 assurance conclusion on the Seattle to Everett run for
20 Sound Transit; is that right?

21 A. No.

22 Q. What I want is on any project where you had
23 to come to a conclusion of reasonable assurance.
24 Is Sea-Tac the largest project that you've worked on?

25 A. No.

19

1 Q. What is?

2 A. Probably this project I described up in
3 Skagit County, and the name was Deep Water Slough.
4 That was that area of 540 acres approximately.

5 Q. That wasn't a development project; correct?

6 A. Correct.

7 Q. Let's focus on development projects. Of the
8 development projects that you've worked on, is Sea-Tac
9 the largest project you've worked on where a JARPA has
10 been submitted where Ecology has to come to a
11 conclusion of reasonable assurance?

12 A. I can't say that without checking my records.

13 Q. Sitting here today, you can't think of any
14 other project that has been larger in that regard than
15 Sea-Tac?

16 A. No.

17 Q. Let's talk about the 401 process in general.
18 What steps do you take as the -- strike that.

19 What position do you hold with respect to
20 review of the JARPA for Sea-Tac?

21 A. Could you repeat or restate that question?

22 Q. What responsibilities have you had with
23 respect to the Port of Seattle's application for a 401
24 certification of the Third Runway project?

25 A. My responsibilities for review of the 401 in

1 the case of the Third Runway project are and have been
2 identical to the responsibilities that I've held for
3 all of the other 401 projects that I have reviewed.

4 The primary responsibility is to review the
5 application, the JARPA application, and all of any
6 additional materials that an applicant might submit for
7 compliance with state law regarding water quality, any
8 other laws that the project might have a relationship
9 to, and to coordinate the review of the substance of
10 the project by technical experts within the agency. Or
11 in the case of Sea-Tac, we contracted out some of those
12 responsibilities to other entities to go through a
13 process of evaluating the adequacy of the application
14 and to ultimately render a decision as to whether or
15 not a 401 certification can be issued.

16 Q. Is part of your job in reviewing these 401
17 applications to come to a decision as to whether
18 Ecology has reasonable assurance that the project won't
19 violate state water quality standards? I'm talking
20 about you personally.

21 A. My responsibility, in coordination and with
22 comment and input from the various technical and po'
23 regulatory staff that are involved in the review of
24 project, is to collate and synthesize those opinions
25 into a recommendation that says either the project does

1 provide the state with reasonable assurance that water
2 quality standards and other state laws will be met, or
3 that it doesn't.

4 Q. So you personally come up with the
5 recommendation on these JARPA applications that you
6 review whether there's reasonable assurance or not?

7 A. What I come up with represents a consensus
8 among the staff who are involved, Ecology staff who are
9 involved in the project, as to whether or not there is
10 reasonable assurance.

11 Q. If you don't agree with that consensus, does
12 your opinion govern over the recommendation that you
13 make?

14 A. I haven't been in a situation where I've had
15 a differing opinion from other staff working on a
16 project.

17 Q. You've always agreed with other staff --

18 A. Yes, I have.

19 Q. -- in terms of whether there's reasonable
20 assurance or not; is that correct?

21 A. That's correct.

22 Q. You said as part of your responsibility that
23 you reviewed the application and that you coordinated
24 the review of the substance of the project by technical
25 experts; is that right?

1 get at is the distinction between what your review was
2 versus what the technical review was by those that you
3 coordinated.

4 A. Right. As I believe is described in my
5 Declaration, there were training requirements and a
6 level of knowledge and skill required for the job.
7 As a part of those requirements, I went through wetland
8 delineation training with the U.S. Army Corps of
9 Engineers; that was a week long training course. I've
10 attended training in salmon ecology. Because of my
11 background and experience, I have a solid understanding
12 of the principles of hydrogeology.

13 Q. I'm sorry, I missed that, Ann. You have
14 solid training in what?

15 A. The principles of hydrogeology.

16 Q. What is that solid training?

17 A. That solid training is my work with King
18 County on the Cedar Hills Landfill working directly
19 with expert witnesses on preparing their testimony and
20 sitting through seven weeks of trial in U.S. District
21 Court and five weeks of trial at State Superior Court
22 listening to expert witness testimony from both the
23 County's perspective and from the Appellant's
24 perspective.

25 Q. And that was as a paralegal?

1 A. That's correct.

2 Q. What is the difference in the type of review
3 that you personally make of the application versus your
4 coordination of the review of the substance of the
5 project by technical experts?

6 A. Another responsibility that I have is to be
7 knowledgeable about the 401 process, to be responsible
8 for ensuring that the applicant has met their
9 responsibilities and their procedural requirements for
10 coastal zone management consistency which involves a
11 number of aspects. And part of it is, I would call it
12 more of an administrative role to get an applicant
13 through the process. There are time lines that are
14 associated with issuing the 401 certification, there
15 are requirements for public notice.

16 In the case of the Sea-Tac project, we had a
17 public hearing, we had a public comment period. There
18 were administrative elements of managing contracts, in
19 this case coordinating meetings, bringing staff
20 together at the right time. That kind of role.

21 Q. So based upon that description, is it fair to
22 say that your role in reviewing the Sea-Tac JARPA
23 application was administrative as opposed to technical?

24 A. It was not entirely administrative.

25 Q. How was it not? That's what I'm trying to

1 A. That was as a paralegal.

2 Q. From the King County Prosecutor's Office?

3 A. That's correct.

4 Q. So let's get back to my question in terms of
5 the review you performed on the Sea-Tac JARPA versus
6 the coordination you did in your role in terms of
7 coordinating the technical experts.

8 And my question was, is it fair to say that
9 your role was more administrative in nature as opposed
10 to a technical review of the JARPA?

11 A. Yes.

12 Q. As part of that administrative review, one of
13 your responsibilities was to coordinate technical
14 experts both inside and outside of Ecology; is that
15 right?

16 A. That's correct.

17 Q. Did you also coordinate review with the Port-
18 retained experts?

19 A. You'll have to be more specific.

20 Q. Well, when you said you coordinated review of
21 the substance of the project by technical experts for
22 evaluating the adequacy of the application, what I want
23 to know is, who were those experts? Were they Ecology
24 experts in-house, employees of Ecology, outside
25 consultants like Kelly Whiting retained by Ecology, and

1 did they also include the Port experts, the experts
2 retained and paid by the Port of Seattle?

3 A. The review that I coordinated was of Ecology
4 employees or technical experts that Ecology contracted
5 with to review material submitted to us by the Port of
6 Seattle. I did not review -- or I'm sorry, I did not
7 direct the work of any of the Port of Seattle
8 consultants. We reviewed the materials submitted by
9 them to us, and then provided the Port back with
10 comments on the adequacy of the material that they had
11 submitted.

12 Q. How did you go about coming to a reasonable
13 assurance conclusion on the Port's 401 application?

14 A. That final determination of reasonable
15 assurance was arrived at after a long process of
16 very -- and a very thorough review of all of the
17 materials submitted to us by the Port of Seattle.

18 Q. You yourself believe that Ecology had
19 reasonable assurance to issue the 401 certificate on
20 August 10; is that correct?

21 A. I do.

22 Q. That was part of the consensus that was
23 reached on or before August 10?

24 A. That's correct.

25 Q. Ecology needed to have reasonable assurance

1 Q. And you made that recommendation because it
2 was your belief on August 10 Ecology had reasonable
3 assurance?

4 A. Yes.

5 Q. What definition of "reasonable assurance" did
6 you use to make the recommendation to your management
7 that the 401 certification be signed, the one issued on
8 August 10?

9 A. The definition that I used is what is
10 described in my Declaration. It is the definition and
11 the process described by Tom Luster in the desk manual
12 that he prepared for Ecology, the draft desk manual.

13 Q. You reviewed that desk manual before making
14 the recommendation to Gordon White?

15 A. I didn't pull it out and reread it. What I
16 did do is applied the training that I had received from
17 Mr. Luster and my own experience in issuing nearly 60
18 water quality certifications to come to the conclusion,
19 after based on lengthy review of all of the material
20 before the Department and input from the technical
21 experts and the regulatory experts and the policy
22 experts, that we had reasonable assurance at the time
23 we issued that certification.

24 Q. How did it come about that the certification
25 was going to be issued on August 10?

1 on or before August 10 to issue that 401 certification;
2 correct?

3 MR. REAVIS: Object to the extent it calls
4 for a legal conclusion.

5 Q. (BY MR. STOCK) That's your understanding,
6 isn't it?

7 A. That's correct.

8 Q. That was your objective, to come to a
9 conclusion of reasonable assurance in issuing the 401
10 certification?

11 A. Could you restate that, please?

12 Q. Sure. That was your job, wasn't it, to come
13 to a conclusion of reasonable assurance before you
14 issued the 401 certification to the Port of Seattle?

15 A. That's correct.

16 Q. And to come to that conclusion, you relied
17 upon the review by experts both in-house at Ecology and
18 consultants retained by Ecology?

19 A. Yes.

20 Q. Did Ecology have that reasonable assurance on
21 August 10 when it issued the 401 certification?

22 A. Yes.

23 Q. Did you make the recommendation that the 401
24 certification be signed?

25 A. Yes.

1 A. We had essentially completed our work and
2 were ready to issue the certification at that point in
3 time.

4 Q. You were under pressure, weren't you, to get
5 the certification done and out by August 10?

6 A. How do you define "pressure"?

7 Q. Well, you were being told, weren't you, that
8 the Port was anxious to get the 401 certification?

9 A. The Port was anxious to get their 401
10 certification when I started back in October of 2000.
11 That didn't change.

12 Q. Did you sense any increasing pressure up to
13 the point that it was issued on August 10 to get the
14 401 certification out?

15 MR. REAVIS: Objection; vague.

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

17 A. I don't think that the pressure increased.
18 It was consistent throughout the process.

19 Q. Well, didn't you start working weekends in
20 July 2001 to get the 401 certification out?

21 A. Yes, I did.

22 Q. And you hadn't worked weekends before, had
23 you?

24 A. No.

25 Q. And you worked the weekends in July because

1 you were under pressure from upper management to get
2 the 401 certification issued?

3 **A.** I worked with upper management to provide
4 them with my best estimate of when I believed I would
5 be able to get a draft certification prepared, as well
6 as my estimate of when I believed the remaining issues
7 that we had concerning the Port's application would be
8 resolved. And that resulted in an estimate to Ray
9 Hellwig, and that estimate was passed on to whoever he
10 passed it on to, I can't say with certainty. But
11 ultimately I believe that estimate was passed on to
12 Paul Isaki, the governor's chief of staff.

13 **Q.** I understand that. And you're telling me
14 that's the reason you worked weekends in July?

15 **A.** The reason I worked weekends in July and
16 maybe even -- yeah, it was July, was because I was so
17 busy during the week going to meetings, technical
18 meetings, stormwater meetings, low flow meetings,
19 wetland meetings, that I didn't have any time to sit
20 down in a quiet manner to do the kind of writing and
21 thinking that I needed to do to thoughtfully prepare a
22 thorough 401 certification. So I came in during the
23 weekends to do that work when it was quiet and there
24 would be no disruptions.

25 **Q.** So you had conversations with Mr. Hellwig

1 August, more or less. And that information was
2 conveyed up the chain of command, to whom I don't know
3 for sure because I didn't pass that information on.
4 Ultimately I believe that that information was latched
5 onto by the governor's office, again, I can't say
6 because I don't work in the governor's office. And a
7 target date of the first or second week of August
8 became pretty set in stone.

9 **Q.** No, I understand all that and I'm not trying
10 to trick you. What I'm trying to get at is, the reason
11 Ray Hellwig came to you and said, We've got to get this
12 certification out, is because he was getting pressure
13 from Gordon White, Tom Fitzsimmons, and the governor's
14 office, and so he came to you and he said, What's the
15 schedule? Isn't that a fair assessment what happened?

16 **A.** He wanted to know what the schedule was, and
17 I told him.

18 **Q.** Is that a fair assessment of what happened?

19 **MR. REAVIS:** Object to the extent the
20 question mischaracterizes her earlier testimony.

21 **Q.** (BY MR. STOCK) I'm not trying to
22 mischaracterize your testimony, Ms. Kenny. That is a
23 fair assessment of what happened, isn't it?

24 **MS. MARCHIORO:** Objection. I think you're
25 asking her to speculate as to what was in Mr. Hellwig's

1 about the schedule as to when you were going to be able
2 to make the recommendation of reasonable assurance?

3 **A.** I did.

4 **Q.** That's what Mr. Hellwig was looking to you
5 for, the recommendation for reasonable assurance?

6 **A.** That's correct.

7 **Q.** And he came to you and he said, Ms. Kenny, or
8 Ann, tell me when you're going to get this reasonable
9 assurance decision made?

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

11 **Q.** He told you in fact that he was getting
12 pressure from Gordon White to get the 401 certification
13 out, didn't he?

14 **A.** No.

15 **Q.** Was there any conversation with Mr. Hellwig
16 about conversations he had with Mr. White or
17 Mr. Fitzsimmons about the need to get the 401
18 certification issued in August?

19 **A.** My recollection is somewhat hazy on what
20 happened because I was not a party to those
21 discussions.

22 I believe what happened was that based on my
23 estimate of the amount of time I felt it would take to
24 get the technical work done and get the certification
25 drafted and reviewed put us out to the first week of

1 mind. And unless the witness can testify that
2 Mr. Hellwig expressed that to her, I think you're
3 asking her to speculate on something she may not have
4 any knowledge of.

5 **MR. STOCK:** That is a leading objection as
6 far as I'm concerned. State your objection and that it
7 mischaracterizes the testimony and we'll move on.

8 **Q.** (BY MR. STOCK) What I want to know, is it a
9 fair assessment that Mr. Hellwig came to you and asked
10 you what the schedule was because he was getting
11 pressure from Gordon White, Tom Fitzsimmons and the
12 governor's office?

13 **A.** I don't believe he ever had any pressure from
14 Gordon White concerning the time line of the permit.

15 **Q.** How about Tom Fitzsimmons?

16 **A.** From Tom Fitzsimmons, I know from
17 conversations with Ray that there was certainly
18 continued concern from the governor's office as to the
19 timing of the permit. And that was the context in
20 which we were trying to get that information back out
21 to management of, okay, when are we going to get done
22 with this.

23 **Q.** Right. Mr. Hellwig told you about the
24 pressure he was getting from Tom Fitzsimmons, didn't
25 he?

1 A. Tom Fitzsimmons was not providing pressure on
 2 me or I believe Ray.
 3 Q. That's not my question.
 4 A. But the pressure was coming from a higher
 5 level.
 6 Q. From the governor's office?
 7 A. From the governor's office, because of the
 8 pressure being put on the governor's office by the Port
 9 of Seattle.
 10 Q. So Ray Hellwig comes to you and says, Ann,
 11 we've got to get this 401 certification out because the
 12 governor's office wants this 401 certification out?
 13 That's a fair assessment?
 14 A. He didn't say that.
 15 Q. Well, not in those words, but that's a fair
 16 assessment, isn't it?
 17 A. I'd say that it's fair to say that there was
 18 certainly interest in Ecology not prolonging that
 19 decision-making process.
 20 Q. I'm not going to mince words with you.
 21 It's a fair assessment that Ray Hellwig came to you and
 22 said, We've got to get this 401 certification out
 23 because the governor's office wants the 401
 24 certification out; isn't that a fair assessment?
 25 MS. MARCHIORO: Objection; asked and

1 Q. Have you --
 2 A. And Mr. Isaki at that point said, Well, that
 3 work needs to get done and Ecology needs to have time
 4 to review it. And he did not in that meeting make a
 5 promises to the Port as to when they would get a 401
 6 certification from the Department of Ecology.
 7 Q. Not in that meeting?
 8 A. Not in that meeting.
 9 Q. And that was at the end of July?
 10 A. Somewhere around that time.
 11 Q. Have you ever before been in the governor's
 12 office sitting with the governor's chief of staff on a
 13 401 application?
 14 A. No, I have not.
 15 Q. That was very unusual, wasn't it?
 16 A. Certainly.
 17 Q. And you had worked weekends before this
 18 meeting in the governor's office to get the 401
 19 application out, isn't that right?
 20 A. Could you restate that question?
 21 Q. Sure. You were working weekends in July
 22 before this meeting in the governor's office to move
 23 the 401 application along to get it issued in August?
 24 A. I can't be certain of the time line of the
 25 meeting relative to my working weekends. It was

1 answered.
 2 MR. REAVIS: I'm going to object to the
 3 question because it appears that you're asking her not
 4 to tell you what Ray Hellwig told her but to
 5 characterize an assessment Ray Hellwig told her. So I
 6 think the question is vague and misleading.
 7 Q. (BY MR. STOCK) Go ahead and answer.
 8 MR. STOCK: Why don't we reread the question
 9 for her.
 10 (Reporter read back as requested.)
 11 A. That's not correct, and I'll tell you why.
 12 Because I participated in a meeting in Paul Isaki's --
 13 in the governor's conference room at the Capitol
 14 Building with Paul Isaki, Ray Hellwig, Tom Fitzsimmons,
 15 Mick Dinsmore, Gina Marie Lindsey, Elizabeth Leavitt
 16 and myself. And I can't remember the exact time line,
 17 but it was before -- it was near the end of July.
 18 And certainly the Port was there expressing
 19 concern and frustration about the time that it was
 20 taking to get the permit out. We in no uncertain terms
 21 told the Port in front of Mr. Isaki that the reason it
 22 was taking so long was not because of Ecology's
 23 protracted review but because of the Port's inability
 24 to get the work done in a timely manner and the
 25 inability of their consultants to get their work done.

1 about -- I'd have to go back and check my time sheets
 2 but, you know, I did basically work continually for
 3 about three weeks prior to issuance of the permit.
 4 Q. I'm going to move on, but in any event, to
 5 sum up, you were under intense pressure to get that 401
 6 certification issued, weren't you?
 7 A. I was under pressure.
 8 Q. Intense pressure?
 9 A. Intense pressure. I also wanted to have a
 10 summer vacation.
 11 Q. Okay, why don't we take a brief break.
 12 A. Okay, sounds good.
 13 (Recess taken.)
 14 Q. (BY MR. STOCK) Let's go back to the
 15 governor's office for a minute. You said that Ecology
 16 told the Port at that meeting that there was
 17 information that was still needed; is that right?
 18 A. We had been telling the Port staff that we
 19 had been working with that there was information
 20 needed. Apparently Mick Dinsmore and Gina Marie
 21 Lindsey hadn't been getting the same feedback from
 22 their own staff as to the status of the project or t'
 23 time line or the delays.
 24 Q. The reason for the delays?
 25 A. The reason for the delays.

1 Q. And your objective was to educate
2 Mr. Dinsmore and Ms. Lindsey as to what additional
3 information was needed --

4 A. Correct.

5 Q. -- before a 401 certification could be
6 issued; is that right?

7 A. Correct.

8 Q. What was the information that you told the
9 Port and the governor's office that was needed in order
10 to issue the 401 certification?

11 A. The only information that was outstanding at
12 that point in time was resolving the impact of analysis
13 for the low flow work.

14 Q. Was that the only information you said that
15 was outstanding at that meeting?

16 A. I believe that was the only major item that
17 was outstanding at that point.

18 Q. What I want is, did you tell the Port and the
19 governor's office whether there was anything else
20 outstanding other than the impact analysis for the low
21 flow work?

22 A. I don't recall.

23 Q. Sitting here today, you can't think of
24 anything else?

25 A. No.

1 A. Just in other times that I've heard him speak
2 or seen him, he's a rather animated, interesting
3 character.

4 Q. He was animated at this meeting when he was
5 expressing frustration?

6 A. Yeah, just normal -- his normal -- I think
7 that's his normal communication style.

8 Q. In any event, he was animated when he was
9 expressing his frustration at the lack of a 401
10 certification at this meeting in the governor's office;
11 correct?

12 A. My impression was that he was certainly
13 interested in the subject.

14 Q. So what did you do in response to this
15 meeting at the governor's office?

16 A. I don't recall specifically, other than just
17 going back to work whenever I went back to work and
18 kept working. We did not take any specific action or
19 change any course of our review or our process as a
20 result of this meeting.

21 Q. Other than to get it out as quickly as you
22 could?

23 A. The work on that was something that I just
24 worked at steadily over that course of three to four
25 weeks to get that certification to the point where it

1 Q. Have you been in the governor's office on any
2 other occasion relating to the Sea-Tac project?

3 A. That was the only time I've been at the
4 governor's office.

5 Q. Did Governor Locke stick his head in?

6 A. No.

7 Q. Any part of his body? He wasn't present?

8 A. No, he was not present at any time during
9 that meeting. Never got to meet him.

10 Q. Was there any decision reached at this
11 meeting?

12 A. No. The message back to the Port from Paul
13 Isaki, as I recall it is, Well, the work needs to get
14 done and Ecology needs to do their job.

15 Q. Did Mick Dinsmore speak at this meeting?

16 A. Yes.

17 Q. What did he tell Paul Isaki?

18 A. He expressed concern about the time that it
19 was taking and frustration about the process.

20 Q. Was he angry?

21 A. No. I can't say whether he was angry. He
22 didn't appear --

23 Q. Did he seem agitated to you?

24 A. No, he seemed to be himself.

25 Q. What do you mean by that?

1 could go out.

2 There were parts of the project that were --
3 a 401 certification involves -- part of it is pretty
4 much boilerplate and then you have to go in and
5 customize it to the project. And there were large
6 parts of this project that were already done, and so
7 there was work that I could begin on the certification,
8 which was a very lengthy certification, the longest,
9 largest, most complex certification that I certainly
10 have ever issued or I believe that the state has ever
11 issued. So it was very time consuming to pull that
12 together.

13 Q. Did you author the 401 certification?

14 A. I pulled together -- parts of it were
15 boilerplate, part of the language came from other
16 staff, I drafted some conditions. It was a
17 collaborative effort. I was the primary author,
18 however, responsible for pulling it together in one
19 comprehensive, cohesive document.

20 Q. Did you write any of the technical sections
21 of the 401 certification?

22 A. I may have made suggestions or added language
23 to language provided by some of the staff. There were
24 sections that -- on the acceptable fill criteria, that
25 I didn't do anything with other than just cut and paste

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1 and just dropped it in verbatim. And there was
2 language provided by John Drabek where I essentially
3 did the same thing. There were subsequent changes made
4 after he reviewed it and others reviewed it.

5 So mostly the technical work was fairly
6 verbatim, the exception being the work that I got from
7 Shannon and Wilson needed some work to take their
8 concerns and recommendations and put them into more of
9 a regulatory format versus the way the recommendation
10 was written. I translated that into --

11 Q. Is this the wetlands section?

12 A. The wetlands section, yes.

13 Q. You said that you relied upon technical
14 policy and regulatory staff in your coordination
15 efforts and that you collated and synthesized what they
16 did into a recommendation of reasonable assurance; is
17 that right?

18 A. That's correct.

19 Q. What technical people did you rely upon to
20 come to your recommendation of reasonable assurance?

21 A. I relied on the work of Katie Walter of
22 Shannon and Wilson who had some hydrogeologic support
23 from someone in her firm; I relied on Eric Stockdale
24 who is with the Department of Ecology. Those were the
25 primary people for wetlands.

1 dam safety at the airport site in terms of the proposed
2 facility.

3 Q. Who?

4 A. The primary person who I got comments from
5 was Gerald LaVasser. I may have spoken with his
6 supervisor in passing about what the dam safety
7 regulations were and when they applied.

8 Q. Any other technical experts?

9 A. I don't think so.

10 Q. How about policy staff? You say your
11 coordination included policy staff and regulatory
12 staff, so what I want from you is policy staff and
13 regulatory staff that you relied upon to come to a
14 reasonable assurance.

15 A. Right. Often our staff have multiple roles,
16 so in terms of wetland policy and regulation, that
17 would have been Eric Stockdale. And to -- no, we did
18 not involve Andy McMillen directly, I don't believe, at
19 headquarters.

20 In terms of water quality policy and
21 regulation, the key person there was Kevin Fitzpatrick
22 and John Drabek. The dam safety people were Gerald
23 LaVasser. On the acceptable fill issue, that I left to
24 Kevin Fitzpatrick's responsibility.

25 Q. Did you ever talk to Pete Kennett?

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1 On the acceptable fill criteria I relied on
2 the work prepared by Chung Yee and Kevin Fitzpatrick.

3 On the issue of potential preferred pathways
4 and contamination from the airport operation
5 maintenance area I relied on Ching Pi Wang.

6 For water quality concerns I relied on Kevin
7 Fitzpatrick, John Drabek.

8 And in terms of the real intense technical
9 review of the Stormwater Management Plan and the Low
10 Flow Analysis, I relied on our contractor, Kelly
11 Whiting, who works for King County. There may be
12 others.

13 Q. That's my question. Any other technical
14 people that you relied upon to come to your
15 recommendation of reasonable assurance?

16 A. Uh-huh. Mr. Dave Garland who is a
17 hydrogeologist in the Water Quality Program provided
18 comments on portions of the Low Flow Analysis.

19 Mr. Roger Nye who works in the Toxics Cleanup
20 Program provided me with background information on
21 toxics issues related to the airport operation
22 maintenance area and the Agreed Order. That was
23 primarily background information.

24 I tapped into some of the knowledge of our
25 dam safety people at headquarters regarding issues of

1 A. Kmet?

2 Q. Kmet.

3 A. No.

4 Q. Why not?

5 A. I was not personally involved in the
6 preparation of those criteria.

7 Q. You let Kevin Fitzpatrick handle that?

8 A. I let Kevin Fitzpatrick manage that process.

9 Q. Okay, any other policy or regulatory staff
10 you relied upon to come to a reasonable assurance
11 conclusion?

12 A. There may be others, but I can't think of
13 them at the moment.

14 Q. How did you decide what experts, technical
15 experts you would rely upon to come to your reasonable
16 assurance conclusion?

17 A. The staff who were involved in the project
18 were primarily already involved in the project prior to
19 my involvement, and those people had been brought in by
20 Mr. Luster and as determined appropriate by the Water
21 Quality Program in our region. Those decisions were
22 made primarily before I got involved in the project.

23 Q. Let me go down Ecology's witness list and get
24 you to react to some of these names just in terms of
25 who they are and how you may have used them, or if you

1 did. There are only two referenced that you haven't
2 mentioned, Gordon White and Ed O'Brien.

3 Did you have any contact with Ed O'Brien
4 regarding the Sea-Tac Third Runway application?

5 **A.** No.

6 **Q.** Any understanding of why he's on Ecology's
7 witness list?

8 **A.** I believe he would be on Ecology's witness
9 list because he is our expert on stormwater management
10 issues for the state and is the primary author of our
11 newly revised Western Washington Stormwater Management
12 Manual.

13 **Q.** Gordon White?

14 **A.** Gordon White is the program manager for the
15 Shorelands and Environmental Assistance Program. He is
16 the person who signed the 401 certification.

17 **Q.** What involvement did you have with him
18 throughout this whole process?

19 **A.** I kept Mr. White informed of the status of
20 the project throughout the process.

21 **Q.** How often did you speak to Mr. White about
22 the Port's application?

23 **A.** When I first started working on the project
24 it was maybe once or twice a month, and then as we
25 progressed towards the decision, it may have been

1 **Q.** Paul Agid?

2 **A.** Mr. Agid, he was someone I worked with only
3 very briefly in terms of the issue of our Preferred
4 Pathways Analysis. I did attend a meeting at the Port
5 offices where I met him. Ching Pi Wang and I went to
6 that meeting; we discussed the types of data that the
7 Port had available to them and the types of analyses
8 that they had available through their consultants to
9 help define that particular issue.

10 **Q.** Anything else with Paul Agid?

11 **A.** There may have been a phone call or two.

12 **Q.** On that particular issue, preferred pathways?

13 **A.** It would have been preferred pathways, I
14 believe.

15 **Q.** How about Berry Christopher, Ph.D., PE,
16 Roswell, Georgia?

17 **A.** I have never heard of him.

18 **Q.** James Kelley, Parametrix?

19 **A.** I am very familiar with Dr. Kelley. He is
20 the Port's lead wetlands specialist.

21 **Q.** Does he go by doctor?

22 **A.** He has a Ph.D. but he doesn't go by doctor.

23 **Q.** What is your involvement with Mr. Kelley?

24 **A.** Mr. Kelley attended a number of the
25 facilitated meetings that we had between -- those

1 sometimes daily near the very end to let him know what
2 the status of the project was and to keep him apprised
3 of the issues we were working on.

4 **Q.** Why were you talking to him daily near the
5 end of the project?

6 **A.** To keep him apprised of the status. Because
7 he was responsible for signing the permit, he wanted to
8 know where we were at.

9 **Q.** Did you have a scheduled call each day with
10 him?

11 **A.** No.

12 **Q.** Would he call or you call?

13 **A.** I would generally just leave a voicemail for
14 him with it and a brief update as to whatever was going
15 on.

16 **Q.** Let me go down the Port's witness list and
17 get your input on some of these individuals, and tell
18 me whether you had any interactions with these
19 individuals.

20 Paul Agid?

21 **A.** Can you define what you mean by
22 "interaction"?

23 **Q.** Well, any communication, written, oral or
24 otherwise.

25 **A.** All right.

1 meetings were ongoing when I started and concluded
2 about the end -- you know, near the end of December of
3 2000. He was in attendance at many of those meetings
4 because we were discussing the Natural Resource
5 Mitigation Plan.

6 Then throughout the process, that time frame,
7 there were several meetings that I attended with Eric
8 Stockdale and Katie Walter with Jim Kelley in
9 attendance where we discussed the Natural Resource
10 Mitigation Plan and our concerns about that plan. And
11 I have had a handful of conversations on the phone with
12 him about, you know, status of the NRMP, when we would
13 expect to receive revised -- you know, if we had asked
14 for revised work when could we expect to receive it.
15 He kept me informed on the status of their work.

16 **Q.** So no technical discussions with him; more
17 administrative in terms of when you expected work
18 product from him?

19 **A.** I did not enter into discussions with him
20 regarding the technical merits of the work.

21 **Q.** Dr. James Mitchell, Ph.D., PE, Geotechnical
22 Engineer, Blacksburg, Virginia?

23 **A.** Never heard of him.

24 **Q.** William Stubblefield, ENSR Toxicology, Ft.
25 Collins, Colorado?

1 A. Never heard of him.
 2 Q. Donald Weitkamp, Parametrix?
 3 A. Mr. Weitkamp I am familiar with. He is a
 4 fisheries biologist, I believe, for Parametrix who
 5 attended one meeting that we had when we were
 6 discussing the Port's impacts regarding low flow. He
 7 provided some commentary and information on low flow
 8 impacts to aquatic species.
 9 Q. Paul Fendt, Parametrix?
 10 A. I am familiar with Mr. Fendt. He is their
 11 lead engineer for the stormwater plan, and I believe
 12 coordinated the review of the low flow plan in concert
 13 with a number of other subconsultants.
 14 Q. What was your involvement with Mr. Fendt?
 15 A. Mr. Fendt was at virtually every meeting I
 16 ever attended with the Port of Seattle, because every
 17 meeting involved the stormwater plan where -- virtually
 18 every meeting except for the separate meetings on
 19 wetlands involved the stormwater plan or the low flow
 20 plan.
 21 Q. So throughout the time that you have been the
 22 project coordinator for the Sea-Tac application, every
 23 meeting you've attended there's been a discussion of
 24 the stormwater plan or the low flow analysis?
 25 A. Virtually every meeting. I can't recall.

1 the sizing of the vaults, safety access issues. I
 2 think that's how that sorted out. They did not come to
 3 every meeting.
 4 Q. And you think Al Black is with HNTB?
 5 A. I'm not sure.
 6 Q. Or one of the two, Hart Crowser?
 7 A. One of the two. They were one of the
 8 subconsultants to the Port providing technical input to
 9 the Port on the stormwater plan.
 10 Q. Keith Smith?
 11 A. Keith Smith I'm familiar with. He is the
 12 stormwater manager, I believe, out at the Port of
 13 Seattle.
 14 Q. What involvement did you have with him?
 15 A. Keith was only limited -- he had limited
 16 involvement up until the end of December. When we got
 17 into the new year, 2001, and we started having another
 18 round of facilitated meetings to resolve remaining
 19 issues in the stormwater plan, Keith became the main
 20 contact for the Port on that process as well as the
 21 process to resolve remaining issues regarding the Low
 22 Flow Analysis.
 23 Q. Norm Crawford, Hydrocomp, Menlo Park?
 24 A. Norm Crawford never came to any meetings that
 25 I was at, as it's my understanding that Mr. Crawford is

1 Q. How about Michael Bailey, Hart Crowser?
 2 A. I'm familiar with Mr. Bailey. I believe he
 3 was responsible for -- I think some aspect of the
 4 geotechnical analysis, but I could be mistaken. He
 5 didn't come to that many meetings.
 6 Q. Did you rely on him in any way?
 7 A. Well, I never relied on -- well, other than
 8 just to listen to what he had to say. I don't
 9 understand what you mean by "rely."
 10 Q. Well, did Ecology rely upon any of his work
 11 product to come to reasonable assurance?
 12 A. I believe that -- I would have to check back
 13 through the file, but he -- you said it was HNTB or
 14 Hart Crowser?
 15 Q. Hart Crowser.
 16 A. I'm getting confused which firm did which
 17 work, but at some point in the stormwater review, I
 18 believe that one or the other firms, because Allen
 19 Black I know with one of those, maybe it was HNTB,
 20 provided additional information on -- okay, I think
 21 Bailey was more the hydrogeologic input. And they did
 22 some extra work on I believe infiltration studies that
 23 Kelly Whiting and Kevin Fitzpatrick wanted to see out
 24 at the airport. And Allen Black I think did the
 25 structural analysis that we had, the concerns we had on

1 the person who had invented the HSPF model and that he
 2 was used at some point by the Port to maybe provide
 3 preliminary analysis to their modeling work. And I
 4 know at the very end in the last couple months they've
 5 called him back in to provide some technical review.
 6 But I've never met him or spoken with him.
 7 Q. Tom Hubbard?
 8 A. H-u-b-b-a-r-d, I believe. Tom is I believe
 9 involved in stormwater management out at the Port, and
 10 I met him at a site visit that I did with John Drabek
 11 and Ron Divitt of my office. And then I had maybe one
 12 or two phone conversations with him.
 13 Q. For what purpose?
 14 A. It was in response to a telephone call with a
 15 complaint from Chris Gower that there was erosion
 16 problems out at the airport. And he called -- I
 17 believe I called Keith Smith about that to find out
 18 what was going on, and I had a call back from Tom
 19 Hubbard with a status report on the situation.
 20 Q. Elizabeth Leavitt?
 21 A. Elizabeth Leavitt is the airport
 22 environmental -- what is she called, the aviation
 23 manager for environmental affairs. I don't have her
 24 exact title.
 25 Q. Sure.

1 A. But she was the main management contact,
2 upper management contact that I had with the Port of
3 Seattle.
4 Q. How often did you deal with her?
5 A. She came to all of the meetings that were
6 held in the facilitated process between when I started
7 in the end of October to the end of December. There
8 were additional meetings that we had to kind of
9 coordinate management of the project, and then I had
10 phone conversations with her if I was trying to track
11 down information or who did I need to talk to about a
12 particular aspect of the project.
13 Q. No technical discussions with her where
14 technical decisions were being made?
15 A. No.
16 Q. Michael -- how do you say it?
17 A. Cheyne.
18 Q. Cheyne?
19 A. Cheyne.
20 Q. I'll never get it right.
21 A. Yeah, well, it's C-h-e-y-n-e, and it's
22 pronounced Shane, S-h-a-n-e.
23 Michael is -- was, I think he's got a new
24 position now. I believe he was their main person doing
25 contract management for coordinating all of the various

1 Earth Sciences there. He may have been one of those
2 two, I just don't recall his name at the moment.
3 Q. Other than that, you've never had involvement
4 with him?
5 A. No, no direct contact.
6 Q. Joseph Brascher, Aqua Terra Consultants?
7 A. Joe Brascher. The Port brought him in as an
8 expert to resolve or to continue working on modeling
9 issues related to both the Low Flow Analysis and the
10 Stormwater Management Plan. B-r-a-s-c-h-e-r.
11 Q. And when did that happen?
12 A. Joe got involved in the process, oh, in -- I
13 can't remember exactly when we started the stormwater
14 meetings. The second round of meetings was late
15 January or February of 2001, he started coming to the
16 stormwater meetings.
17 Q. And is that your involvement with him,
18 through those stormwater meetings?
19 A. And low flow. I don't believe I've ever
20 spoken with him outside of that context.
21 Q. Pony Ellingson at Pacific Groundwater Group?
22 A. Pony Ellingson is a consultant for the Port.
23 His specialty is groundwater modeling.
24 Q. Have you had any involvement with him?
25 A. Not other than his attendance at these

1 contracts that they have related to constructing
2 various elements of the Port's Master Plan Update
3 Improvement projects which include the third runway.
4 Q. Any involvement with him?
5 A. Yes. Mr. Cheyne again came to most of --
6 almost all of the meetings between October and the end
7 of December 2000. He came to a few of the early
8 meetings on low flow. He was also my contact for the
9 contracts that we had with the Port to pay for the
10 services of King County and Shannon and Wilson.
11 Q. Elizabeth Clark?
12 A. Beth Clark?
13 Q. Yes.
14 A. Beth Clark I have never had any personal
15 contact with. It's my understanding that she works
16 with Paul Agid and has some responsibility for the fill
17 that's being imported out to the airport site.
18 Q. And you say you've never worked with her?
19 A. I've never worked with her. I'm familiar
20 with her by name only.
21 Q. John Strunk, Associated Earth Sciences?
22 A. Could you pronounce that last name again?
23 Q. Sure. Strunk, S-t-r-u-n-k.
24 A. At that meeting that I mentioned with Paul
25 Agid, there were one or two gentlemen from Associated

1 meetings basically regarding the Low Flow Analysis.
2 Q. Jan Cassin, C-a-s-s-i-n, Parametrix?
3 A. I believe Jan is a wetlands specialist that
4 was working under Jim Kelley. I don't believe that I
5 ever had any direct contact with her, although I knew
6 that she was working on doing the legwork on preparing
7 the NRMPs, some of the NRMPs.
8 Q. Charles Wisdom, Parametrix?
9 A. That name doesn't have any familiarity.
10 Q. Mary Vigilante, Synergy Consultants?
11 A. I'm not sure who she is, but at some point I
12 was asked to forward public comments to her at the
13 Port's request.
14 Q. When was that request made?
15 A. Somewhere around the time of the public
16 comment period which was -- I don't know, last year
17 sometime. Earlier this year.
18 Q. No other involvement with her?
19 A. No, no direct involvement at all.
20 Q. William Dunlay, Lee Fisher Associates?
21 A. I haven't heard of him.
22 Q. San Francisco International Airport?
23 A. No, never any contact with him.
24 Q. Mike Riley, Papadopoulos and Associates?
25 A. No, that's not ringing any bells.

1 Q. Olympia?

2 A. No. I may have met him but it's not a name

3 that's --

4 Q. Steve Swinson, R. W. Beck?

5 A. No.

6 Q. All right, let's switch gears.

7 You mentioned that you had been on a site

8 visit with one of these witnesses we just talked about.

9 Do you remember which one? Well, let me ask this.

10 How many site visits have you been on for the

11 Sea-Tac Airport application?

12 A. I went on a site visit -- I can't remember

13 the exact date, but it would have been sometime after

14 we had Shannon and Wilson on contract, January or

15 February. I know it was before --

16 Q. Of 2001?

17 A. 2001, prior to the earthquake. Katie Walter

18 and Sam Casne with Shannon and Wilson and I went out

19 with Jim Kelley and Elizabeth Leavitt and Paul Fendt

20 and did a tour of all of the wetland areas on site at

21 the airport.

22 There was another site visit that I attended

23 down in Auburn with Katie Walter that was right after

24 the earthquake because I remember we were trying to

25 reschedule it or something. And so it was Katie

1 and then we did a site tour.

2 Q. Why were the attorneys involved in this site

3 visit?

4 A. I believe that our attorneys and the Port's

5 attorneys -- well, first they wanted to better

6 understand the technical issues involved with this very

7 complex analysis that was done for the low flow work.

8 And then our attorneys wanted some familiarity with the

9 layout of the site and locations for proposed

10 structures under the third runway application.

11 Q. Any other site visit?

12 A. No, not to my recollection.

13 Q. On any of these site visits did you need any

14 sort of security or clearance?

15 A. Access to these areas is limited. The

16 airport is fenced. There is security in place, and you

17 need to sign in and you're assigned a visitor ID pass

18 that must be visible. And there are various

19 checkpoints that you have to go through, and only

20 certain Port staff have the secret code.

21 Q. The magic card or whatever?

22 A. The code or the card to get past various

23 gates that have either staffed gates or locking gates

24 to get on site.

25 Q. But prior to going to the site visit you

1 Walter, Elizabeth Leavitt, Jim Kelley, myself, I think

2 Sam Casne was there from Shannon and Wilson. And

3 that's all I recall at the moment. So we did a walking

4 tour of the site.

5 There was another site visit out at the

6 airport where I went out with John Drabek with Ecology

7 and Ron Divitt who is a water quality inspector.

8 Q. Debit?

9 A. D-i-v-i-t-t, maybe, I can't remember; Tom

10 Hubbard from the Port, and Keith Smith. I believe it

11 was Tom.

12 Q. When was this site visit?

13 A. Well, I don't recall exactly, but sometime in

14 the last -- you know, between maybe March or April.

15 Q. 2001?

16 A. 2001, correct. And what we did on that visit

17 was we looked at all of the stormwater management

18 facilities related to the airport and various outfalls,

19 looked at basically everything there was to see out

20 there.

21 Q. Any other site visits at the airport?

22 A. I went on another site visit in late June or

23 early July. There was a briefing meeting that the Port

24 held for their attorneys and our attorneys to be

25 briefed on the Low Flow Management Plan and Analysis,

1 didn't go through any sort of security clearance?

2 A. No, no.

3 Q. Or give your Social Security number or

4 anything like that?

5 A. I don't believe so.

6 Q. Were you required to do anything in advance

7 of these site visits?

8 A. No.

9 Q. Were you allowed to see whatever you wanted

10 to see?

11 A. Yes.

12 Q. Were you always escorted?

13 A. Yes.

14 Q. By a Port person, I'm talking about?

15 A. Right. We went in Port vehicles and they

16 drove, primary consideration there being sure that you

17 don't cross the pathway of a jet that's taking off or

18 landing.

19 Q. Sure. Other than that, though, there weren't

20 any restrictions on where you could go or what you

21 could see?

22 A. No, it was whatever we wanted to go. We'd

23 stop, we'd get out, we'd look around. Whatever we

24 wanted to do was fine.

25 Q. So if you wanted to see a particular outfall,

1 you told them and you were taken there?
 2 A. Yeah, we went, that's correct.
 3 (Recess taken.)
 4 Q. (BY MR. STOCK) How did you get involved with
 5 the Sea-Tac Airport application?
 6 A. I was asked to take on responsibility for the
 7 401 certification.
 8 Q. By whom?
 9 A. By my supervisor.
 10 Q. Who was that?
 11 A. Jeannie Summerhays.
 12 Q. What did she say?
 13 A. She asked if I would be interested in doing
 14 that, and I said yes.
 15 Q. Did she explain why you were being asked?
 16 A. She said that she had been asked by Paula
 17 Ehlers if there was possibility in our capacity in our
 18 region for that responsibility to be taken on.
 19 Q. Did she tell you about her conversation with
 20 Ms. Ehlers?
 21 A. Indirectly -- well, she indicated that there
 22 was the desire for Tom Luster to get back to some of
 23 his other job responsibilities as the policy lead for
 24 401.
 25 Q. Did you have any conversations with Paula

1 Mr. Luster was not able to provide reasonable assurance
 2 at that point in time?
 3 A. No.
 4 Q. You've never heard that?
 5 A. No.
 6 Q. From anyone?
 7 A. No.
 8 Q. Have you ever heard from anyone that the
 9 reason Mr. Luster was taken off of the project was
 10 because Ecology management thought Mr. Luster was
 11 holding the Port to an unreasonable standard?
 12 A. No.
 13 Q. You haven't heard that from anyone ever?
 14 A. No.
 15 Q. Have you ever had any discussions with anyone
 16 as to why Mr. Luster was moved off of the 401 project?
 17 A. Yes.
 18 Q. Who?
 19 A. Ray Hellwig.
 20 Q. And when did you have those conversations?
 21 A. It would have been around the time that I
 22 first started on the project.
 23 Q. And what did Mr. Hellwig have to say in that
 24 regard?
 25 A. He voiced concerns that Tom perhaps had lost

1 Ehlers directly?
 2 A. Yes, I did.
 3 Q. Regarding whether you were going to take on
 4 the task of coordinating the 401 application?
 5 A. Yes.
 6 Q. And did you have those conversations before
 7 it was decided you would be assigned to the project?
 8 A. There was a conference call that Jeannie
 9 Summerhays and I participated in with Paula Ehlers and
 10 Tom Luster to discuss the scope of the workload for the
 11 Third Runway project to try to estimate the time that
 12 would be involved. And at the end of that meeting I
 13 believe that we all concurred that it would be possible
 14 for me to take that workload on.
 15 Q. In this telephone conversation did Tom Luster
 16 give you his view on whether there was reasonable
 17 assurance?
 18 A. We didn't discuss the --
 19 Q. Technical aspects?
 20 A. -- technical aspects of the project.
 21 Q. Did you have a conversation with Paula Ehlers
 22 prior to this conference call?
 23 A. I don't believe I did.
 24 Q. Did you hear at any time that the reason that
 25 Tom Luster had been taken off the project was because

1 his ability to be objective about the project.
 2 Q. Did he say what the basis of that view was?
 3 A. He stated that there were occasions where
 4 various members of the team would come to consensus on
 5 an approach for resolving an issue and Tom would
 6 disagree.
 7 Q. And for that reason Mr. Hellwig was of the
 8 view that Mr. Luster had lost his ability to be
 9 objective about the project?
 10 A. I can't answer directly what Mr. Hellwig
 11 thought.
 12 Q. But that was your understanding as to why he
 13 thought that?
 14 A. That was my impression.
 15 Q. Any other reason that you got that
 16 impression?
 17 A. The impression that?
 18 Q. Well, you're right, let me ask the
 19 question --
 20 A. I can't remember.
 21 Q. Mr. Hellwig voiced a concern that Tom Luster
 22 had lost his ability to be objective about the project,
 23 and you've now told me that he explained there were
 24 occasion where members of the team would come to a
 25 consensus and Mr. Luster would disagree.

1 And my question is, did Mr. Hellwig explain
2 further why he believed that Mr. Luster had lost his
3 objectivity about the project?

4 A. I believe I recall Mr. Hellwig telling me
5 that over the course of the time that Mr. Hellwig had
6 been involved in the project, that Tom seemed to have a
7 difficult time telling the Port what the standards for
8 review of the project would be, that he was continually
9 introducing new issues to the project, that he was
10 unable to tell the Port what the bottom line was in
11 terms of what Ecology was looking for.

12 Q. Did Mr. Hellwig tell you where he had heard
13 these criticisms of Mr. Luster?

14 A. Mr. Hellwig was very closely involved with
15 the process from sometime maybe the summer of 1999, and
16 he's continued in that role as the regional office's
17 management lead on the project. So you would have to
18 ask him, but it's I believe from his personal
19 experience in the process.

20 Q. Sure, we will ask Mr. Hellwig. But what I
21 want from you is what your memory is in terms of what
22 Mr. Hellwig has told you with respect to why Mr. Luster
23 was removed from the project.

24 Do you recall Mr. Hellwig telling you that
25 the Port was dissatisfied with Mr. Luster's review of

1 Tom was overreaching on our authority to regulate some
2 of the cumulative impacts that might be associated with
3 the project.

4 Q. Did you have this discussion with her before
5 you became the permit coordinator for the Port's
6 application?

7 A. No, I don't believe so.

8 Q. This was about the time that the transition
9 happened between Mr. Luster and you?

10 A. I believe that conversation happened well
11 after that -- well, a month after that transition, a
12 month, six weeks, eight weeks, but not immediately
13 around that time.

14 Q. Have you heard any other criticism of
15 Mr. Luster from anyone down in Olympia or Lacey?

16 A. Yes.

17 Q. Tell me about it.

18 A. In the time that I've worked on 401 issues
19 there have been several occasions where other 401 staff
20 have not agreed with Mr. Luster's approach to 401
21 management.

22 Q. What do you mean?

23 A. What I mean by that is that Tom would take a
24 position, and other experienced, knowledgeable,
25 competent 401 reviewers didn't agree with his approach.

1 the application?

2 A. I believe I recall him indicating that he had
3 heard some concern from the Port that Mr. Luster was
4 not giving clear direction to them or consistent
5 direction as to what standards they needed to comply
6 with.

7 Q. And how were those concerns on the part of
8 the Port transmitted to Ecology?

9 A. I don't know.

10 Q. Did Mr. Hellwig tell you that Ecology upper
11 management was dissatisfied with Mr. Luster's
12 performance on the 401 review of the Port's
13 application?

14 A. What do you mean by upper management?

15 Q. Well, anyone above Mr. Hellwig at the
16 headquarters.

17 A. I don't believe so.

18 Q. Have you ever heard anyone from headquarters
19 criticize Mr. Luster's performance on his review of the
20 Port's application?

21 A. Yes, I have.

22 Q. What criticisms have you heard from
23 headquarters?

24 A. A specific criticism that I heard was from
25 Sandra Manning. She voiced concern that she felt that

1 Q. Okay, I need specifics.

2 A. All right.

3 Q. Who are you talking about and what did they
4 say?

5 A. I'm talking about Bonnie Shorin and Sandra
6 Manning and Rick Vining and Loree Randall who are all
7 or have been involved in 401 review for the Department
8 of Ecology.

9 Q. Were any of those individuals involved with
10 the review of the Port's application?

11 A. No, they were not.

12 Q. So these were more general criticisms about
13 Mr. Luster's approach to 401 review rather than a
14 specific criticism of his review of the 401 application
15 for the Port's project?

16 A. They were specific criticisms on projects
17 other than the third runway.

18 Q. Have you ever heard any criticism from anyone
19 about Mr. Luster's review of the Port's application
20 other than what you've already told me about from Ray
21 Hellwig?

22 A. I've heard concerns from Eric Stockdale.

23 Q. When and what did Mr. Stockdale say?

24 A. Several times in the last year Mr. Stockdale
25 has indicated that he believed that Tom was going

1 beyond the bounds of what was reasonable to require in
2 terms of mitigation for this project.

3 Q. Was he any more specific in what he meant?

4 A. I believe, again, it was in regards to the
5 situation or the circumstance where the parties
6 involved with the project would come to an
7 understanding about what was required based on what
8 Mr. Luster or Mr. Stockdale had told them, and the Port
9 would go off and do their work and then Mr. Luster
10 would come back with an additional piece of work that
11 he wanted them to do. So there was never a bottom line
12 or an end to the things that Mr. Luster was requiring
13 for the project.

14 Q. Did Mr. Stockdale give you any specifics
15 other than these general statements?

16 A. No, it was more general.

17 Q. Have you heard criticisms from anyone else
18 about Mr. Luster's performance on the Port's
19 application?

20 A. Yes, I have.

21 Q. Who and what did they say?

22 A. I have heard criticisms from Mr. Kevin
23 Fitzpatrick. And he said that Mr. Luster was unwilling
24 to listen to his input as a water quality expert
25 regarding the status or the sufficiency of the status

1 And there were a number of occasions where,
2 as I stated earlier, other competent, experienced,
3 well-informed people doing 401 review did not agree
4 with Mr. Luster's conclusion or approach in terms of
5 401.

6 Q. In terms of what the applicant may or may not
7 have needed to provide to the Department of Ecology?

8 A. That's correct.

9 Q. But in terms of his knowledge about 401
10 issues and his technical expertise on 401 issues, you
11 don't have any basis to disagree with the statement
12 that he's an expert in those areas?

13 A. I believe Mr. Luster has considerable
14 experience in the area of 401 management.

15 Q. And you don't believe that you are any more
16 of an expert than Mr. Luster is with respect to 401
17 issues?

18 A. No.

19 Q. You're not, are you?

20 MS. MARCHIORO: Asked and answered. She said
21 no.

22 Q. (BY MR. STOCK) Well, I just want to make
23 sure. Is that your answer?

24 A. Mr. Luster trained me.

25 Q. You had conversations with Mr. Luster, didn't

1 of the Port's application for purposes of water
2 quality.

3 Q. Did Mr. Fitzpatrick say anything more
4 specific than that with respect to Mr. Luster's
5 performance in his review of the Port's application?

6 A. I'm not recalling any specific details at
7 this point.

8 Q. Any other criticisms that you've heard?

9 A. Not at the moment. I don't recall any at the
10 moment.

11 Q. You don't have any basis to challenge
12 Mr. Luster's expertise with respect to 401 issues, do
13 you?

14 A. I do.

15 Q. Wasn't Mr. Luster held in high regard within
16 the Department of Ecology for his 401 expertise?

17 A. No.

18 Q. What basis do you have to challenge
19 Mr. Luster's expertise on 401 issues?

20 A. The basis that I have is my experience in
21 working with Mr. Luster and other members, we called it
22 the 401 team, review team. These were a combination of
23 headquarters people and ultimately regional 401
24 reviewers who had that responsibility in that same
25 role.

1 you, when the transition occurred from Mr. Luster to
2 you?

3 A. I did.

4 Q. And didn't Mr. Luster tell you at that time
5 that he had concerns with respect to reasonable
6 assurance on the Port's project?

7 A. He didn't put it in those terms.

8 Q. What did Mr. Luster tell you with respect to
9 the Port's project when the project was transitioned
10 over to you?

11 A. We sat down, we reviewed the history of the
12 project, we discussed various substantive areas where
13 at that time, the end of October 2000, he had concerns
14 about the project.

15 Q. What concerns did Mr. Luster express to you
16 that he had about the project when it was transitioned
17 over?

18 A. We talked about numerous areas of this very
19 large, complex project. And he explained where there
20 was work that still needed to be done, and we went
21 through basically every issue related to the airport.

22 Q. He had criticisms with respect to wetland
23 mitigation, did he not?

24 A. I don't recall that he had specific concerns
25 about the adequacy of the wetland mitigation package.

1 Q. You don't recall Mr. Luster telling you that
2 he had concerns about the adequacy of wetland
3 mitigation?

4 A. What I recall him telling me is that there
5 were some issues that were still being discussed as a
6 part of this facilitated process that had been
7 identified that were outstanding with the Natural
8 Resource Mitigation Plan. He didn't indicate to me
9 whether he felt that they were unresolvable issues.

10 Q. This was after the Port submitted its
11 application again on October 25, 2000?

12 A. Correct.

13 Q. In fact, that was the time when you got
14 assigned to the 401 project?

15 A. That's correct.

16 Q. Didn't Mr. Luster also express to you that
17 there were outstanding issues with respect to the
18 Stormwater Management Plan?

19 A. That's correct.

20 Q. And what did he say in that regard?

21 A. Well, he explained that the reason that
22 Ecology was in the position to deny the permit, the
23 second application of the permit, was due to
24 inadequacies in the Stormwater Management Plan near the
25 end of August of 2000.

1 status of the Port's compliance with their NPDES permit
2 at the Port, and was told that although there had been
3 some exceedances of the water quality criteria, that
4 itself did not constitute violation of the water
5 quality standards. And in Kevin's opinion there was --
6 you know, there was no direct evidence to say that all
7 of the BMPs in place out at the Port were inadequate.

8 Q. Just some of them?

9 A. He didn't say that.

10 Q. Is that what you took from the conversation?

11 A. No.

12 Q. You're not saying today that all of the BMPs
13 that are followed out at the airport with respect to
14 water quality management are adequate, are you?

15 MR. REAVIS: Objection; lack of foundation.

16 A. I don't have the expertise to make that
17 determination.

18 Q. (BY MR. STOCK) Let's talk about leading up
19 to the issuance of the August 10 401 certification.
20 Was there any meeting or event that ultimately resulted
21 in you deciding that you had the opinion there was
22 reasonable assurance to go ahead and issue this August
23 10 certification?

24 A. No specific meeting or event.

25 Q. Did you always assume that you could come to

1 Q. 1999, you mean? Oh, no, 2000 --

2 A. 2000, yeah.

3 Q. Right. And in fact, he told you that the
4 preponderance of the evidence was that the Port's plan
5 would result in a violation of the state water quality
6 standards?

7 A. He didn't put it in those terms.

8 Q. In general that is what he was saying?

9 A. What he told me was that Kevin Fitzpatrick in
10 his expertise as a water quality specialist and also
11 based on the review of King County in terms of where
12 the Stormwater Management Plan was at that time was
13 that that plan was not adequate at that time to give
14 the state reasonable assurance that water quality
15 standards would not be adversely affected.

16 Q. And one of the reasons that he discussed with
17 you that the plan wasn't adequate was because existing
18 BMPs out at the airport were inadequate?

19 A. That might have been an opinion of his that
20 he expressed. I don't recall.

21 Q. Well, did you do any sort of investigation
22 yourself to determine the adequacy of the existing BMPs
23 at the airport with respect to water quality
24 management?

25 A. I spoke with Kevin Fitzpatrick about the

1 a finding of reasonable assurance on the Port's
2 project?

3 A. No.

4 Q. Was coming to a no decision on the Port's
5 project an option in your mind?

6 A. Yes.

7 Q. The Department of Ecology had told the Port
8 in September 2000 that it was going to deny the second
9 application, isn't that right?

10 A. That's my understanding.

11 Q. And after that when you came on board, did
12 you receive any sort of instructions that you were to
13 come to a finding of reasonable assurance on the Port's
14 project?

15 A. No.

16 Q. That you had to do what it took to get to
17 reasonable assurance?

18 A. No.

19 Q. Nothing like that?

20 A. No.

21 Q. What did you rely upon to conclude that you
22 had reasonable assurance or you had enough informati-
23 to make the recommendation of reasonable assurance i
24 the August 10 certification?

25 A. The baseline for that were the issues that

1 were outstanding and unresolved at the time Ecology
2 made the determination that it could not recommend
3 approval on the second application for this project.

4 And so at that point in time, after I believe
5 the Port withdrew rather than receive a denial,
6 meetings were held at Ecology, which I was not a party
7 to, that established a facilitated process to identify
8 every issue remaining to be resolved to get to a point
9 where Ecology could make a determination as to whether
10 or not there was reasonable assurance in this project.

11 Q. What were those outstanding issues?

12 A. Those outstanding issues are documented in
13 notes prepared by Kate Snider of Floyd and Snider.
14 There's a whole list, and they're broken down by the
15 Stormwater Management Plan, by Low Flow, by the Natural
16 Resource Mitigation Plan. There were numerous itemized
17 issues that required resolution.

18 Q. Whose idea was it of these facilitated
19 meetings?

20 A. I'm not sure exactly.

21 Q. The Port paid for the facilitator, did it
22 not?

23 A. The Port paid for the facilitator.

24 Q. And once you became responsible for review of
25 the Port's application, you participated in each of

1 Q. But it wasn't written down in the notes, was
2 it?

3 A. Sometimes it was. I believe it was. I
4 believe they were.

5 Q. Was the overriding goal at those meetings to
6 reach consensus on the technical issue being discussed?

7 A. No.

8 Q. It wasn't?

9 A. No.

10 Q. It was to exchange information, wasn't it?

11 A. That's correct.

12 Q. And there was a discussion of minority views
13 when they were raised?

14 A. These were facilitated meetings, they were
15 not negotiations. We did not -- we entered into that
16 process, my understanding was, to facilitate clear
17 communication. The role of Ecology was to clearly
18 explain what it was looking for. The obligation of the
19 Port was to provide us with information and come back
20 with explanations of what they were doing.

21 Ecology reserved final judgment on the
22 adequacy of the technical presentations and verbal
23 information that we were given us until we received a
24 final work product. So we made the final call after we
25 got the work product that had been discussed during

1 those facilitated meetings?

2 A. I did.

3 Q. Notes were taken at those meetings?

4 A. Yes.

5 Q. Who took the notes?

6 A. The notes were taken by Kate Snider and to
7 some extent I believe her assistant, Rachel McCrear.

8 Q. What was the purpose of the facilitated
9 meetings?

10 A. The purpose was to facilitate clear
11 communication between Ecology and the Port of Seattle
12 regarding what it would take to resolve the remaining
13 issues related to the project.

14 Q. To come to a finding of reasonable assurance?

15 A. To come to a point where a determination
16 could be made as to whether there would be reasonable
17 assurance or not.

18 Q. Well, wait a minute. When technical issues
19 were discussed at the facilitated meeting, wasn't the
20 objective to find a way to get to reasonable assurance
21 on that particular technical issue?

22 A. Yes.

23 Q. If a minority opinion was expressed at those
24 facilitated meetings, what would happen?

25 A. It was explored and discussed.

1 this process of what it should contain, the issues it
2 should address --

3 Q. But there were -- as issues were discussed in
4 those facilitated meetings, technical issues were
5 resolved at those facilitated meetings, wasn't it?
6 That's why the notes say "Resolved"?

7 A. They were resolved in terms of mutual
8 agreement and understanding of the next steps of work
9 that should take place after we came to a mutual
10 understanding of the scope and the nature of the work.
11 So --

12 Q. So when the facilitated meeting notes say
13 "Resolved," that means that that technical issue was
14 resolved at that facilitated meeting, doesn't it?

15 A. No.

16 Q. Well, why does it say "Resolved" then?

17 A. You have to go back to the introduction to
18 those meeting notes and look at the purpose of the
19 meeting. Ecology never gave over its final say on the
20 adequacy of a technical issue -- the final say on
21 whether the Port's approach to the issues that we had
22 remained with Ecology. What we tried to agree to was a
23 mutual approach.

24 And the Port was given its assignments to go
25 out and do the work and, you know, Okay, we don't know

1 what you want us to do, Ecology. So Ecology told them.
2 And they said, Okay, we'll do this, but -- so that was
3 what we meant for "Resolved," that they agreed they
4 understood what they were supposed to do and they
5 agreed to go out and do it.

6 Q. Well, as I read through those facilitated
7 meeting notes, you can track those notes, and over the
8 course of the history of the different meetings you see
9 a technical issue moving along where there's a back and
10 forth, Ecology saying provide us this information, the
11 Port says, yes, we will provide you that information,
12 and ultimately that technical issue comes to a
13 resolution and the notes say "Resolved."

14 And my question is, that issue of when it
15 says "Resolved," that was resolved in everyone's mind
16 there at those technical meetings in terms of
17 reasonable assurance, and that when you say it wasn't
18 resolved and you're saying that Ecology had the
19 ultimate decision, the ultimate decision you're talking
20 about is when Gordon White signs the 401 certification;
21 isn't that a fair assessment?

22 A. No.

23 Q. Where did I go wrong?

24 A. When we worked through a technical issue, the
25 first step was to come to a meeting of minds as to what

1 the question was, and then they talked about various
2 approaches to how it might be resolved which were of a
3 technical nature. And these were presented by the Port
4 as, okay, we can do A, B or C. And we would say, okay,
5 we'll do B and part of C, for example.

6 In those meetings between October and the end
7 of December, what it was was a work assignment for the
8 Port to go out and do the work that we had agreed to in
9 these meetings. But we didn't know until they went out
10 and they did the work or did the analysis and turned in
11 in mid December the revised Stormwater Plan, the
12 revised NRMP, the Low Flow Report, whether or not that
13 work had been adequately done. So there was an
14 agreement in concept to an approach.

15 When we got the materials in, they were
16 reviewed again and they were measured against the
17 understanding that we had about the approach that we
18 had -- this conceptual approach. This was the Port
19 saying, Well, this is what we could do. They hadn't
20 yet done the work or they were in the process of doing
21 the work or they hadn't compiled the work. So it was
22 when we actually got the final document in that we sat
23 down as Ecology to review the adequacy of that
24 material.

25 Q. Sure. And as the process moved forward into

1 2001 and those facilitated meetings continued, Ecology
2 was continuing to review the Stormwater Management Plan
3 that was submitted by the Port in December 2000;
4 correct?

5 A. That's correct.

6 Q. And through that facilitated process over the
7 course of the eight months between the time that it was
8 submitted and the time that the 401 certification was
9 issued, Ecology would raise various issues related to
10 its review of the Stormwater Management Plan; correct?
11 Is that correct?

12 A. That's correct.

13 Q. And then that would be discussed at the
14 facilitated meeting and there would be a resolution
15 then ultimately of that issue that Ecology had raised?

16 MR. REAVIS: Let me just object to the
17 question first because I think it's vague covering a
18 number of meetings over a period of months. And the
19 use of --

20 MR. STOCK: All you have to say is it's
21 vague. That's a proper objection.

22 Q. (BY MR. STOCK) Go ahead and answer the
23 question.

24 A. I see that I need to make a distinction
25 between the meetings that were held between the end of

1 October and the end of December, and the new round of
2 technical -- of meetings that were held -- a new round
3 of meetings that were held between January and very
4 late July.

5 The first round of meetings which I described
6 as arriving to a conceptual approach as to how to
7 resolve the issue, that was one approach. And then the
8 documents were submitted in December. Basically they
9 started arriving on December 19th of 2000 by the
10 truckload into my office.

11 And we parcelled them out to be reviewed by
12 the appropriate staff, and those staff came back with
13 comments. Primarily the comments were from our
14 consultant, Kelly Whiting, at King County. And we
15 identified areas where the Port had failed to live up
16 to the conceptual agreement and do the work that we had
17 identified in that first round of meetings.

18 So there was another round of technical
19 meetings, more technical meetings to resolve these
20 issues. And then as we went through that process,
21 there was more of an effort to get an actual work
22 product in to review and sign off on and approve.

23 Q. Right, to reach resolution on the technical
24 issues?

25 A. To reach resolution on the technical issues.

1 Q. So that would ultimately be approved?
 2 A. That's correct.
 3 Q. All right, let's talk about the extent of the
 4 information or knowledge that Ecology had when it
 5 issued the 401 certification on August 10.
 6 You had the Stormwater Management Plan,
 7 December 2000; correct?
 8 A. When we made the decision on August 10, we
 9 had a version of the stormwater plan consisting of
 10 replacement pages which reflected the resolution of the
 11 technical issues that we had worked on during the
 12 preceding months.
 13 Q. You had a Natural Resources Mitigation Plan;
 14 correct?
 15 A. That's correct.
 16 Q. And what version did you rely upon to issue
 17 the 401 certification on August 10?
 18 A. That would have been I believe the one that
 19 came in in the end of December 2000 with some
 20 additional changes that were made in the interim to the
 21 Auburn Grading Plan. And there were some other
 22 adjustments that were made during that process, but it
 23 was primarily the December 2000 version of the NRMP.
 24 Q. And you had a Low Flow Analysis?
 25 A. And we had a revised Low Flow Analysis.

1 Q. When you say "revised," you're talking about
 2 the revisions at the end of July 2001; correct?
 3 A. That's correct.
 4 Q. Anything else that you relied upon to issue
 5 the 401 certification?
 6 A. We had the Preferred Pathways Analysis that
 7 was prepared by the Port and reviewed by Ching Pi Wang.
 8 We had completed our acceptable fill criteria. I
 9 believe those were the major pieces in place at that
 10 time.
 11 Q. And based upon that body of knowledge from
 12 those reports, revised or otherwise, you made the
 13 recommendation that Ecology had reasonable assurance
 14 that water quality standards would not be violated by
 15 this project; is that right?
 16 A. That's correct.
 17 Q. Why, then, does the August 10 certification
 18 ask for additional reports from the Port?
 19 A. It's not uncommon in a 401 certification to
 20 ask for revisions to reports to incorporate changes
 21 that we've required in the 401.
 22 Q. Are the reports, revisions, changes that
 23 you've asked the Port to provide necessary for you to
 24 come to reasonable assurance?
 25 A. No.

1 Q. So if the Port didn't submit any of the
 2 plans, reports, changes, revisions that are laid out in
 3 the 401 certification, you're telling me that Ecology
 4 would have reasonable assurance?
 5 A. Yes.
 6 Q. So why ask for the reports then? Isn't your
 7 job done?
 8 A. The 401 process for issuing the certification
 9 is one where we do not negotiate in advance with the
 10 applicant or any other party what the terms and
 11 conditions of the 401 are, so there may be areas where
 12 we require additions to a particular report or
 13 clarifications.
 14 In the case of the Natural Resource
 15 Mitigation Plan, there were numerous -- basically
 16 non-substantive technical issues that needed to be
 17 corrected. There were small errors on location of root
 18 wads and how it was connected to the stream bank and a
 19 lot of little things like that where we want to see a
 20 final plan that incorporates those changes.
 21 Q. Well, let's not focus on the little changes.
 22 I'm talking about the significant changes, whether it's
 23 in the Low Flow Analysis, Stormwater Management Plan,
 24 details relating to plans to monitor contamination in
 25 the fill. Isn't that information necessary for Ecology

1 to have reasonable assurance?
 2 A. It's very common in 401 certifications to
 3 require subsequent monitoring plans to be submitted.
 4 Q. Ms. Kenny, I don't mean to interrupt you, but
 5 my question is simple. Ecology needs that additional
 6 information specified in the 401 certification to have
 7 reasonable assurance, isn't that right?
 8 MR. REAVIS: Objection; vague.
 9 A. I don't believe so.
 10 Q. (BY MR. STOCK) Well, then why is it included
 11 in the 401 certification? Why isn't it included in a
 12 letter from you to Ms. Leavitt or from anyone at the
 13 Department of Ecology to the Port?
 14 A. Because the 401 certification is the tool
 15 that we normally use to ensure that we do eventually
 16 close all of the gaps on any permit decision that we
 17 make.
 18 Q. That additional information is a critical
 19 part of the 401 certification, isn't it?
 20 A. Yes and no.
 21 Q. There are statements in that 401
 22 certification that says Ecology has the right to revoke
 23 the certification if the Port doesn't provide the
 24 additional information, isn't that right?
 25 A. That's correct.

1 Q. And the reason those statements are in the
2 401 certification is because the information is needed
3 to get to reasonable assurance?

4 MR. REAVIS: Objection; vague.

5 A. The reason the additional information is
6 needed is to provide the complete and full picture of
7 what monitoring plans are required, additional
8 information that doesn't detract from our understanding
9 of the project or our ability to determine that those
10 impacts can be fully mitigated.

11 Q. (BY MR. STOCK) The reason why the Department
12 of Ecology has reserved its right to revoke the
13 certification if the Port doesn't provide the
14 additional information is because Ecology needs that
15 information to have reasonable assurance, isn't that
16 true?

17 A. It's a part of the picture of what
18 constitutes reasonable assurance.

19 Q. That's right, it's a part of the reasonable
20 assurance. Agreed?

21 A. I agree.

22 MR. STOCK: Why don't we take our lunch
23 break.

24 (Deposition recessed at 12 noon, to be
25 reconvened at 1:00 p.m.)

1 A. The first application?

2 Q. Right.

3 A. No.

4 Q. And you didn't review that at any time; is
5 that right?

6 A. No.

7 Q. You didn't review it?

8 A. I did not review that file.

9 Q. And you didn't receive the file relating to
10 the second application; is that right?

11 A. No, I did not.

12 Q. And you didn't review that file either?

13 A. No, I didn't.

14 Q. What you received from Mr. Luster was what
15 was on his desk and on his floor?

16 A. That's correct.

17 Q. Was there anything else that you received?

18 A. No.

19 Q. What was the general nature of the material
20 that was on his desk and floor?

21 A. There were reports, the August 2000 version
22 of the Natural Resource Mitigation Plan, earlier
23 versions of the stormwater plan, various reports
24 related to the project prepared by the Port, notes of
25 earlier meetings, e-mails.

1 AFTERNOON SESSION
2 1:00 P.M.
3 --oOo--
4

5 CONTINUING EXAMINATION

6
7 BY MR. STOCK:

8 Q. At the time that you became the permit
9 coordinator for the airport case and the file was
10 transferred over from Tom Luster, did you receive from
11 his office all of the files related to the project?

12 A. There are -- no.

13 Q. Did you receive any files from his office?

14 A. Yes.

15 Q. What did you receive and what didn't you
16 receive?

17 A. What I did not receive were the files
18 relating to the first application and to the second
19 application. The other material that I received was
20 the material that he had in his office piled on his
21 desk and on his floor, and he put it into two boxes and
22 brought that up here. So that was a combination of
23 reports and notes and various sundry items.

24 Q. So you didn't receive the file relating to
25 the Port's first application filed back in 1997 or '98?

1 Q. Did it matter to you what was submitted by
2 the Port in support of its first application?

3 A. No.

4 Q. Did it matter to you what was submitted by
5 the Port in support of its second application?

6 A. No.

7 Q. If the Port referred to an analysis, plan or
8 report that it had submitted in support of its first or
9 second application, did you go back and review what the
10 Port was relying upon?

11 A. Sometimes.

12 Q. In what instances would you do that?

13 A. I don't recall.

14 (Deposition Exhibit No. 70 was marked for
15 identification.)

16 Q. (BY MR. STOCK) Ms. Kenny, do you recognize
17 Exhibit 70 as an e-mail exchange that you had with
18 Andrea Grad in this office in the late May/early June
19 time frame?

20 A. Let me take a moment to review it, please.
21 (Witness reading document). I recall this e-mail
22 exchange.

23 Q. And at the bottom of the first page, Ms. Gra
24 is asking for a copy of the 1999 report entitled Water
25 Effects Ratio Screening Study of Sea-Tac prepared by

1 Parametrix; is that right?
 2 A. That's correct.
 3 Q. And at the end of May you're telling Ms. Grad
 4 that that may be in Mr. Luster's files in Lacey; is
 5 that right?
 6 A. That's what's written there.
 7 Q. And you told Ms. Grad in the meantime that
 8 she may wish to obtain the document from the Port; is
 9 that right?
 10 A. That's what the e-mail says.
 11 Q. And that's what you said to Ms. Grad;
 12 correct?
 13 A. That's correct.
 14 Q. And prior to this date, you had not reviewed
 15 that document; is that right?
 16 A. Yes.
 17 Q. Did you prior to issuing the August 10 401
 18 certification try to be as careful as you could in
 19 reviewing the information you thought you needed to
 20 review to recommend issuance of the August 10
 21 certification?
 22 A. Yes.
 23 Q. Did you try to be as complete as possible in
 24 drafting the August 10 certification?
 25 A. Yes.

1 draft copy of the certification. After the Port
 2 received their certification, they came back to us and
 3 had some areas where they had some concerns where the
 4 language in the certification would be operationally
 5 difficult for them to comply with.
 6 Q. What does it matter that there's language in
 7 a 401 certification that the applicant or the project
 8 proponent finds operationally difficult to comply with?
 9 A. Well, my training in conditions and my
 10 understanding of conditions is that there needs to be a
 11 nexus to the impact, and there also needs to be the
 12 ability of the applicant to be able to perform the
 13 condition or fulfill the terms of the condition.
 14 Q. And on August 10 when Ecology issued the 401
 15 certification, it believed that the conditions in the
 16 certification and how those conditions were to be
 17 implemented was necessary for reasonable assurance?
 18 A. That's correct.
 19 Q. How were you informed that the Port disagreed
 20 with some of the provisions in the August 10 401
 21 certification?
 22 A. About two weeks after the permit was issued
 23 after I had come back from a short vacation, the Port
 24 asked for a meeting with me to discuss the permit.
 25 Q. Didn't Gordon White call you at home and tell

1 Q. Did you try to be as accurate as possible in
 2 drafting the 401 certification?
 3 A. Yes.
 4 Q. It was important to you that that 401
 5 certification be complete and accurate when it was
 6 issued on August 10?
 7 A. That's correct.
 8 Q. Did you give it considered thought as to
 9 whether it was ready to be issued on August 10?
 10 A. Yes.
 11 Q. You ultimately, "you" being Ecology,
 12 ultimately issued that certification on August 10; is
 13 that right?
 14 A. That's correct.
 15 Q. You ultimately issued an amended
 16 certification on September 21; is that right?
 17 A. That's correct.
 18 Q. And you did that because there were changes
 19 that you decided needed to be made?
 20 A. That's correct.
 21 Q. What led up to your decision to issue an
 22 amended certification given the careful review you had
 23 given the August 10 certification?
 24 A. As I stated earlier in this deposition, it's
 25 not Ecology's practice to provide the applicant with a

1 you about the meeting?
 2 A. What meeting?
 3 Q. With the Port, that the Port was proposing to
 4 discuss the 401 certification?
 5 A. I don't recall that Gordon White had anything
 6 to do with setting up that meeting.
 7 Q. Well, maybe it was Ray Hellwig. You got a
 8 call at home about the proposed meeting that the Port
 9 was wanting to set up, didn't you?
 10 A. I don't recall getting a call at home.
 11 Q. How did you hear about the meeting that the
 12 Port wanted?
 13 A. It may have been through a voicemail or in
 14 person. I don't recall.
 15 Q. So what happened?
 16 A. We had a meeting.
 17 Q. Who was at the meeting?
 18 A. I believe that Elizabeth Leavitt was present
 19 at the meeting, Michael Cheyne, Joan Marchioro from the
 20 Attorney General's office. I believe that was all.
 21 Q. Who from Ecology?
 22 A. Myself.
 23 Q. Anyone else?
 24 A. I don't recall.
 25 Q. What happened at the meeting?

1 A. We sat down and listened to the Port go
2 through the permit and provide us with their concerns
3 about various conditions in the permit.

4 Q. Who did the talking for the Port?

5 A. I believe both Elizabeth Leavitt and Michael
6 Cheyne spoke.

7 Q. Did either one of them take the lead?

8 A. I don't recall.

9 Q. So what did the Port tell you on the changes
10 that it wanted to make to the 401 certification?

11 A. We first went through various conditions, and
12 they asked questions about the meaning or the intent of
13 the condition, and I tried to provide them with my
14 understanding of what I intended in that condition.

15 The second area of concern were more specific
16 conditions where they expressed some concern that it
17 might be difficult or burdensome for them to comply
18 with the terms of the condition.

19 Q. If a term is needed for -- or a condition is
20 needed for reasonable assurance, does it matter whether
21 the project proponent is going to find it difficult to
22 comply with the provision?

23 A. No.

24 Q. That doesn't change the need for the
25 condition for purposes of reasonable assurance, does

1 applicant has come back and asked you to make
2 substantive changes to the 401 certification?

3 A. That's correct.

4 Q. So didn't it strike you as unusual that the
5 Port was coming back to you now and asking for these
6 changes to the certification?

7 A. Not at all.

8 Q. Were you expecting that?

9 A. I wasn't surprised.

10 Q. Were you expecting it?

11 A. I didn't know what to expect after I issued
12 the permit.

13 Q. Well, based upon your prior experience, were
14 you expecting the Port to call you and ask for changes?

15 A. As I said, I wasn't surprised by the request
16 because of the complexity and the length of the permit
17 and the fact that the applicant did not have an
18 opportunity to review or provide any input into that
19 permit.

20 Q. Wasn't that what the facilitated meetings
21 were for?

22 A. No.

23 Q. The Port through those facilitated meetings
24 had a good idea what the conditions were going to be in
25 the 401 certification before it was issued; isn't that

1 it?

2 A. No. There may be different ways that the
3 condition can be written to still provide reasonable
4 assurance while meeting the operational concerns of an
5 applicant.

6 Q. Did it concern you that the Port was asking
7 you to make changes to the certification that had just
8 been issued?

9 A. No.

10 Q. Had you on any other occasion after a
11 certification, a 401 certification that you had written
12 had been sent out by Ecology, met with the project
13 proponent and subsequently made changes to the
14 certification?

15 A. There were one or two times where I made
16 revisions to a certification in response to a phone
17 call from an applicant.

18 Q. And what was that regarding?

19 A. The changes were regarding time lines for
20 submittal of as-built reports as a part of the
21 mitigation plan requirements.

22 Q. So other than those telephone calls from an
23 applicant where they ask you to change the submittal
24 time line for as-built drawings, there's never been a
25 401 certification that you've written where an

1 a fair statement?

2 A. It is not.

3 Q. Are you saying that the Port didn't have any
4 idea what the conditions were going to be?

5 A. They had an idea what some of the conditions
6 would be. They did not have any idea about a large
7 number of the specifics of the conditions as they were
8 put into the 401 certification.

9 Q. Did you at any time share any draft of any
10 portion of the 401 certification that was ultimately
11 issued with anyone from the Port prior to issuance of
12 the 401 certification?

13 A. No.

14 Q. No section or sentence from the certification
15 was shared with the Port prior to issuance?

16 A. No.

17 Q. Did you personally discuss over the telephone
18 or in meetings with anyone from the Port what some of
19 the conditions were going to be prior to issuance of
20 the August 10 certification?

21 A. Early in the facilitated process there was
22 some discussion prior to my involvement of what some
23 conditions might be, and then at some point in the
24 facilitated process not long after I got involved, we
25 said, Wait a minute, we're not here negotiating

1 conditions. Anything that is discussed as a possible
2 condition is being discussed in a "what if" context
3 only. We're not making any promises or commitments
4 that we will or will not do anything.

5 And if you could repeat the question and I
6 can recall --

7 Q. Where you were going? Sure, that's fine.

8 (Reporter read back as requested.)

9 A. Absolutely not.

10 Q. (BY MR. STOCK) But it was discussed in these
11 facilitated meetings?

12 A. Once or twice.

13 Q. What conditions?

14 A. I don't recall specific conditions.

15 Q. Well, in general were they on wetlands,
16 stormwater, low flow, contamination?

17 A. Probably regarding any of the above.

18 Q. In general can you recall which ones?

19 A. No.

20 (Deposition Exhibit No. 71 was marked for
21 identification.)

22 Q. (BY MR. STOCK) You've been handed Exhibit
23 71. Please identify what it is.

24 A. This appears to be the first draft of the 401
25 certification that I prepared.

1 numerous facets to it, so there may have been times
2 where the Port gave us material that met part of our
3 needs but didn't meet the whole need, and we would have
4 to go back to them and ask for that missing or
5 additional piece of information.

6 Q. What stands out in your mind as to an area
7 where you had to go back to the Port and ask for
8 additional information?

9 A. One area that is well documented is the
10 stormwater plan that was submitted in December of 2000.

11 Q. Anything else?

12 A. The low flow plan that was an analysis that
13 was submitted in December of 2000.

14 Q. Anything else?

15 A. Not that I can think of at the moment.

16 Q. By the time that this July 29 draft
17 certification had been written by you, had the Port
18 provided you with all of the information that you had
19 requested?

20 A. I don't recall.

21 Q. Was there anything in this draft
22 certification that asked the Port to provide the
23 information that you had already asked the Port to
24 provide that information? And look through it if you
25 need to.

1 Q. Why are you sending it to the people that you
2 did?

3 A. I'm sending it to the people that I did
4 because they are people who were on the 401 review
5 team, and I wanted them to look at it and provide me
6 with any comments that they might have on the permit.

7 Q. At this point on July 29, had a consensus
8 been reached that Ecology had reasonable assurance to
9 go ahead and issue the certificate?

10 A. By and large.

11 Q. What do you mean?

12 A. There appeared to have been some work product
13 that was still outstanding from the Port that had not
14 come in, but it was expected to arrive.

15 Q. In general over the time that you reviewed
16 the application, how did you find the Port's
17 responsiveness to Ecology's request for additional
18 information?

19 A. I found that the Port tried very hard to
20 provide us with the information that we required.

21 Q. And do you believe the Port was as thorough
22 as possible in providing that information to you?

23 A. For the most part they were.

24 Q. What do you mean "for the most part"?

25 A. This is a very large and complex project with

1 A. There would have been nothing in this draft
2 certification that would have been a communication to
3 the Port.

4 Q. That's not my question. My question is, if
5 you read through that draft certification, is there any
6 information in that draft certification which you are
7 requiring the Port to provide down the road that you
8 had already asked the Port to provide you that
9 information?

10 A. There may have been some components where the
11 Port had not completely provided us with the
12 information that we had requested where I put in a
13 condition that would require or compel the submittal of
14 the final pieces of that information.

15 Q. Right, that's my understanding. And what I'm
16 wanting to know is, what components, what information
17 did you need from the Port?

18 MR. REAVIS: This is as of the date of this
19 document?

20 MR. STOCK: Sure. Or actually, it doesn't
21 matter whether it's this document or the August 10
22 certification that was ultimately signed.

23 Q. (BY MR. STOCK) What information had you
24 asked the Port to provide to you before the
25 certification was issued that that request is included

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1 in the certification?

2 **A.** That's best addressed by looking directly at
3 the August 10 certification, because there were
4 probably -- there was a long time in terms of time line
5 between whatever date this is, July 29th, and the time
6 it actually went out the door on August 10th.

7 **Q.** Do you recall receiving information from the
8 Port between July 29 and August 10?

9 **A.** I may have.

10 **Q.** Do you recall receiving it?

11 **A.** Not specifically.

12 **Q.** Okay, you've got the August 10 certification
13 in front of you which is Exhibit 2. Is there
14 information that you had requested from the Port that
15 you had not received and so you included it in the
16 August 10 certification, the request?

17 **A.** I can go through this item by item.

18 **Q.** If that's what you need to do, go ahead.

19 **A.** On Page 2.

20 **Q.** Of the cover letter?

21 **A.** No, of the body of the certification. And
22 this is going to be kind of maybe confusing, but on
23 Item A2, Instream/Shoreline Work Monitoring Plan, that
24 is something where we had not requested information but
25 we were requiring it as a condition of the

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1 certification.

2 That's a very broad question. Maybe if you
3 broke it down into smaller segments.

4 **Q.** Well, I really can't. What I need from you
5 is an answer to my question, whether there was any
6 information that you had asked the Port for prior to
7 the 401 certification on August 10 that you had not
8 received from the Port.

9 **A.** (Witness reviewing document.) No.

10 **Q.** It's your belief that all of the information
11 that you had requested from the Port you received
12 before you issued the certification on August 10?

13 **A.** That's correct.

14 **Q.** Having now looked through the certification,
15 is that still your answer?

16 **A.** There are parts of the certification where I
17 required additional information that related to various
18 parts of the project that we had not discussed in
19 advance with the Port, so there was no failure on their
20 part to submit us that information. For example, we
21 required additional wetland mitigation for temporary
22 impacts, and they were required to submit a conceptual
23 plan for that mitigation within a certain amount of
24 time after issuance of the permit.

25 There were some things about information that

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1 they had submitted that we didn't agree with or didn't
2 believe was adequate and we didn't accept it and
3 required a different set of information or a different
4 approach to be submitted to us.

5 **Q.** Okay, go back to Exhibit 71, your draft
6 certification. Your e-mail to the 401 reviewers, your
7 second sentence says, "It is still very rough but given
8 the time constraints ahead of us I want to get this to
9 you so that you can start looking it over and provide
10 me with feedback."

11 What time constraints are you referring to in
12 that sentence?

13 **A.** This was the commitment that had been passed
14 on or the estimate of time that had been passed on
15 through the upper management to the governor's office
16 that the certification would be ready for release
17 sometime in early August.

18 **Q.** Did you consider that to be a time
19 constraint?

20 **A.** It was a target that we were shooting for.

21 **Q.** But you used the words "time constraint"
22 here. You viewed it as a time constraint.

23 **A.** I viewed that as a goal that I was committed
24 to trying to reach.

25 **Q.** That was a goal that was established by upper

1 management given direction from the governor's office;

2 **MS. MARCHIORO:** Objection. Mischaracterizes
3 testimony of the witness.

4 **A.** It was a goal that I felt I could meet. If I
5 worked long and hard and rigorously to get the job
6 done, it could be met.

7 **Q.** (BY MR. STOCK) So on that basis you viewed
8 that as a time constraint?

9 **A.** Yes.

10 **Q.** Because of the time constraint, did that
11 affect the quality of your work?

12 **A.** I don't believe so.

13 **Q.** Again, you tried to be as accurate as
14 possible when you issued that August 10 certification;
15 is that right?

16 **A.** I did.

17 **Q.** All right, let's look at the September 21
18 certification which is Exhibit 1.

19 Prior to issuing the September 21
20 certification, was there discussion within Ecology as
21 to the implications for issuing an amendment to the
22 certification that was issued on August 10th?

23 **A.** What do you mean by "implications"?

24 **Q.** Well, whether it could be done.

25 **A.** Yes.

1 Q. Tell me about those discussions.
 2 A. There were discussions about the best
 3 approach to use for making any subsequent changes that
 4 we wanted to make to the certification after issuance
 5 of the original certification on August 10th.
 6 Q. Was there discussion about the impact to the
 7 reasonable assurance finding?
 8 A. Yes.
 9 Q. And what was said in that regard?
 10 A. The determination was that the changes would
 11 not have an impact on our assessment that there was
 12 reasonable assurance regarding this certification.
 13 Q. Who made that determination?
 14 A. I made that determination in consultation
 15 with the team members that were involved in the
 16 project.
 17 Q. Did you discuss with anyone whether there
 18 would be a question as to whether Ecology had
 19 reasonable assurance on August 10 if you proceeded to
 20 issue an amended certification on September 21?
 21 A. Not that I recall.
 22 Q. Did that thought cross your mind?
 23 A. No.
 24 Q. Take a look at the cover letter for the
 25 September 21 certification. Did you write the cover

1 projects identified in the Port's Master Plan Update
 2 Improvements. Some of those projects directly impact
 3 wetlands and have implications for water quality,
 4 others of those projects have no direct correlation to
 5 anything that Ecology would be regulating directly as a
 6 result of this application.
 7 Q. Well, that answer doesn't help me. I need
 8 your understanding of what "related projects" is, and
 9 what I hear from you, and tell me if I'm wrong, but
 10 you're telling me that "related projects" means any
 11 related project in the Master Plan Update that directly
 12 impacts wetlands or affects water quality?
 13 A. That's my interpretation of that.
 14 Q. Couldn't that be said about any construction
 15 project under the Master Plan Update?
 16 A. No. Not all projects impact, directly impact
 17 wetlands. All projects, if they are built, will have
 18 potential for stormwater, and the stormwater plan was
 19 comprehensive to the entire airport facility.
 20 Q. It covers all of the Master Plan Update?
 21 A. I believe so.
 22 Q. The reference in the "Re" line and also under
 23 the Order refers to Miller, Walker and Des Moines
 24 Creek. What is the reason that it refers to those
 25 creeks?

1 letter?
 2 A. This cover letter is basically boilerplate
 3 cover letter that I adapted to reflect that a revised
 4 certification was being issued and that we were
 5 rescinding the original certification and replacing it
 6 with this amended certification. So I did author it.
 7 Q. That's what your initials mean on the second
 8 page above the enclosure line, "GW:AK"?
 9 A. That's correct.
 10 Q. You were drafting this for Gordon White's
 11 signature; is that right?
 12 A. That's correct.
 13 Q. In the "Re" line on the first page of the
 14 cover letter and also in the descriptive language of
 15 the Order itself in the upper right-hand corner, it
 16 refers to "Construction of a Third Runway and related
 17 projects."
 18 What does "related projects" mean?
 19 A. Those are projects associated with -- strike
 20 that.
 21 It refers to the projects identified in the
 22 Port's JARPA where Ecology has jurisdiction.
 23 Q. Doesn't Ecology have jurisdiction over all of
 24 the projects identified in the JARPA?
 25 A. The JARPA referenced a whole suite of

1 A. Those were the water bodies that were
 2 identified where there was likely to be impact from the
 3 project.
 4 Q. Gilliam Creek is also impacted by the
 5 project, isn't it?
 6 A. We looked at Gilliam Creek in review of the
 7 stormwater plan and determined that there weren't any
 8 direct impacts or likelihood of impact to that stream
 9 from the one project I believe that was located in that
 10 area adjacent to Gilliam Creek.
 11 Q. And what project was that?
 12 A. I'm not certain, but I believe it was
 13 relocation of a water tower.
 14 Q. So other than that project, Ecology made the
 15 determination that there was no impact to Gilliam Creek
 16 from any Master Plan Update project?
 17 A. Yes, for the purposes of the 401 water
 18 quality certification.
 19 Q. In the second to the last paragraph on the
 20 first page of your cover letter you state the work
 21 authorized by this certification is limited to the work
 22 described in the JARPA, the Corps' Public Notice, and
 23 the plans submitted by the Port to Ecology for review
 24 and written approval.
 25 What did you mean when you said the plans

1 submitted by the Port to Ecology for review and written
2 approval?

3 A. It would be the whole suite of plans that we
4 had received prior to issuance of the permit, which
5 included the completed and approved stormwater plan,
6 the low flow plan, the Natural Resource Mitigation
7 Plan, and then any plans that we identified in this
8 certification for later submittal and approval.

9 Q. Does that phrase expand the scope beyond the
10 JARPA or the Corps' public notice?

11 A. No.

12 Q. So is that phrase redundant?

13 A. It may be redundant, but it, again, states
14 the scope of the certification.

15 Q. That's what I need to know, whether those
16 plans submitted expanded the work authorized other than
17 what's in the JARPA or the public notice.

18 A. No. Those plans were all directly related to
19 work specifically identified in the JARPA.

20 Q. The last paragraph on that page you say that
21 the certification shall be withdrawn "if the project is
22 revised in such a manner or purpose that the Corps or
23 Ecology determines the revised project must obtain new
24 authorization and public notice."

25 You wrote that sentence?

1 A. I believe that's part of the boilerplate
2 that's in most of our permits.

3 Q. And why did you include it in this permit?

4 A. Seems reasonable.

5 Q. Why did you include it?

6 A. There was no reason not to include it.

7 Q. What does it mean?

8 A. It means that if there is a substantial
9 revision in Ecology's determination or the Corps'
10 determination from the original scope and purpose of
11 the project, that this permit would not be valid if we
12 make that determination.

13 Q. What manner or purpose -- strike that.

14 In what way would the project need to be
15 revised in its manner or purpose for Ecology to revoke
16 the certification and require the Port to obtain new
17 authorization?

18 MS. MARCHIORO: Objection; calls for
19 speculation.

20 A. That is my answer. That would be
21 speculative. I will give you an example.

22 If the Port wanted to turn the third runway
23 into a golf course and were to -- yeah, let's say a
24 golf course, and that new impervious surface was to
25 become turf and they were to be applying pesticides and

1 a whole different use than originally scoped in the
2 original EIS and the mitigation we had already
3 designed, we would have to look at that and see if it
4 still fit within the original scope and purpose of the
5 project.

6 Q. (BY MR. STOCK) So that's an example of a
7 change in purpose; right?

8 A. That's an example.

9 Q. That would result in a revocation of the 401
10 certificate?

11 A. If that were to come before me as a proposal
12 by the Port, they wanted to convert that new third
13 runway into a golf course, then we would revoke this
14 permit.

15 Q. So why are you smiling about that?

16 A. I don't think that it's likely that the Port
17 is going to turn a facility that hasn't even been built
18 yet into a golf course.

19 Q. I don't either.

20 A. It's an absurd example.

21 Q. So can you give me a less absurd example of
22 what change in manner or purpose would result in a
23 revocation of the 401 certification?

24 A. I can't say at this point in time.

25 Q. You don't know?

1 A. I don't know.

2 Q. But Ecology reserves that right?

3 A. That's correct.

4 Q. What if the Stormwater Management Plan
5 changes?

6 A. We have established in this certification
7 that the Stormwater Management Plan as it's approved
8 now will serve as the basis. There may be changes made
9 to the Stormwater Management Plan in the future as a
10 result of changes to the NPDES permit, but it's our
11 intent that it serve as a baseline.

12 Q. What type of change in the Stormwater
13 Management Plan would result in Ecology requiring the
14 Port to seek new authorization?

15 A. I can't speculate on that at this point in
16 time.

17 Q. What about a change to a regional detention
18 facility?

19 A. There are provisions in this certification
20 that would allow for a regional detention facility.

21 Q. Really? Point it out to me. Page 26?

22 A. Page 26, small letter D. "Nothing in this
23 Order shall be deemed to prohibit continued
24 participation by the Port in planning efforts to
25 establish regional detention facilities for Des Moines

1 or Miller Creek."

2 Q. You agree this doesn't allow the Port to
3 change the Stormwater Management Plan to a regional
4 detention facility-based Stormwater Management Plan
5 without seeking authorization? That would take an
6 amendment to this Order, wouldn't it?

7 A. That's correct.

8 Q. And so if the Port is proposing to proceed
9 with a regional detention facility concept for
10 stormwater management, Ecology is going to have to
11 pursue an amendment of this Order, isn't it?

12 A. Yes.

13 Q. And that would require new public notice?

14 A. It would likely require new public notice.

15 Q. It would, wouldn't it?

16 A. I would put it out for new public notice,
17 yes.

18 MR. STOCK: Let's take a quick five-minute
19 break.

20 (Recess taken.)

21 Q. (BY MR. STOCK) Let's go back to the
22 September 21 certification, Exhibit 1. If you look at
23 the first page of the Order itself --

24 A. The Order itself.

25 Q. -- and compare it to the first page of the

1 short-term water quality modification would be
2 appropriate.

3 Q. What did you take him to mean by that?

4 A. What I took him to mean by that was what he
5 told me, was that the water quality regulations are
6 written in such a manner where they should be able to
7 construct their project without requiring a suspension
8 of the -- a short-term suspension of the water quality
9 standards.

10 Q. So it's your belief that the Miller Creek
11 channel can be switched without a violation of any
12 water quality standards?

13 A. That's correct.

14 Q. And that's one of the bases upon which you
15 determined reasonable assurance?

16 A. Yes.

17 Q. Do you have an understanding of how that
18 channel switch is going to be made?

19 A. I know it's described in the Natural Resource
20 Mitigation Plan. In general for projects like this
21 where a channel is relocated, the new channel is
22 constructed and all of the habitat features that are a
23 part of the channel such as root wads, vegetation that
24 might be planted, all of that's installed.

25 And then at some point the existing channel

1 August 10 Order, I noticed in the title that the
2 September 21 Order does not include the language "In
3 The Matter of Granting a Water Quality Certification,"
4 and the language it doesn't include "And Short-Term
5 Water Quality Modification."

6 What was the reason that was dropped from the
7 August 10 order?

8 A. That was a mistake. That should not have
9 been in the August 10th version of the certification.
10 There was no short-term water quality modification
11 granted as a part of the certification.

12 Q. Didn't the Port tell Ecology that a
13 short-term water quality modification would be needed
14 with respect to the Miller Creek channel being
15 switched?

16 A. What they told me was that they didn't
17 believe one would be needed because they felt that
18 their BMPs would be adequate to prevent any problem,
19 but that it wouldn't hurt to have one in the
20 certification.

21 Q. So why did you drop it?

22 A. I dropped it because after it was reviewed by
23 -- I think it was forwarded for review to Ron Divitt in
24 the Water Quality Program. He came up and spoke to me
25 and told me that this was not a situation where a

1 is basically rerouted and opened into that new channel,
2 and then the old channel is -- I don't know how they do
3 it, they drain it or something, and then the water is
4 rerouted into that new channel.

5 Q. Isn't the initial wash-through of the new
6 channel going to result in water quality standards
7 being violated downstream?

8 A. No.

9 Q. What's the basis for your saying that?

10 A. The basis for saying that is with the BMPs
11 that the Port has proposed.

12 Q. For switching Miller Creek?

13 A. For switching Miller Creek.

14 Q. Did you review those BMPs for switching
15 Miller Creek?

16 A. Not personally.

17 Q. So you relied upon somebody else's review of
18 that?

19 A. Yes.

20 Q. Who?

21 A. Katie Walter looked at those plans. I also
22 spoke with Jim Kelley about what was planned for that
23 particular switch.

24 Q. But sitting here, you can't tell me what
25 those BMPs are?

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1 A. I know that one of the actions, one of the
2 preventative measures was ensuring that the kind of
3 gravel that they import for lining the channel with
4 after the installation of the fabric underlay is that
5 it be very clean gravel with a minimum of fines so that
6 there's just not going to be the sediment in there to
7 get carried away. They probably also will have as a
8 part of their Hydraulic Project Approval, which is
9 normal for these kind of projects, some kind of silt
10 curtain in place downstream of the new channel when
11 that water goes through.

12 Q. Would that be a prudent BMP?

13 A. That would be a prudent BMP.

14 Q. And do you have any knowledge whether that is
15 a BMP proposed in the Natural Resource Mitigation Plan
16 for the channel switch?

17 A. I don't recall.

18 Q. If it's not in there, would you disagree with
19 that?

20 A. I'm not sure what you're asking.

21 Q. Well, what I'm asking is, you're telling me
22 that an appropriate BMP for a channel switch is to have
23 a silt screen downstream; correct?

24 A. That is one appropriate BMP.

25 Q. It would be a prudent thing to do?

1 A. If the silt curtain was the only BMP that
2 they were proposing and they were not going to use it,
3 then that would raise some concerns.

4 Q. But right now you don't have an opinion on
5 whether the absence of that silt screen would be
6 something you disagree with?

7 A. No, I do not have an opinion.

8 Q. What's the status of the Port's application
9 for an HPA from Fish and Wildlife?

10 A. I don't know.

11 Q. Is that something you care about?

12 A. Yes.

13 Q. Is it needed for reasonable assurance?

14 A. No.

15 Q. Are you requiring it as part of reasonable
16 assurance?

17 A. It's a part of the packet. We can't compel
18 the applicant to obtain a Hydraulic Project Approval
19 nor can we compel the Department of Fish and Wildlife
20 to issue that approval. However, they can't construct
21 without it.

22 Q. In other words, on Page 2 of your cover
23 letter you're telling the Port, You've got to get this
24 HPA or you can't move forward with this certification?

25 A. No.

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1 A. That's correct.

2 Q. And if that silt screen BMP is not proposed
3 to be used in the NRMP, then you would disagree with
4 that?

5 A. I can't say without reviewing the entirety of
6 the BMPs that they have in place for that particular
7 activity. Usually more than one BMP is in place for
8 that kind of activity.

9 Q. Well, based upon your current knowledge of
10 the BMPs the Port's proposing for that channel switch,
11 if the silt screen isn't part of that, would you
12 disagree with not including that BMP in there?

13 A. That calls for me to speculate on something
14 I'm not sure on. I know that the Port is still in the
15 process of obtaining their Hydraulic Project Approval
16 from the Department of Fish and Wildlife, and often for
17 instream work, Ecology relies on the Department of Fish
18 and Wildlife to set suitable standards for instream
19 work.

20 We also have instream monitoring plans that
21 we are requiring. I know that there are BMPs that they
22 have proposed. I just would have to review the NRMP
23 and consult with Katie Walter to recall what they are.

24 Q. So sitting here, you don't want to disagree
25 with that, I take it?

1 Q. What if the Port doesn't obtain the HPA?

2 A. Well, then they can't -- they'll be in
3 violation of the hydraulic code. And I know that they
4 were in discussions with Fish and Wildlife to pursue
5 that HPA.

6 Q. The certification that Ecology issued on
7 September 21 is subject to the conditions contained in
8 the HPA, isn't that right? That's what you say in your
9 cover letter.

10 A. That's what it says in the cover letter.

11 Q. And if it's subject to the conditions in the
12 HPA and the Port doesn't obtain an HPA, then don't you
13 agree that that destroys reasonable assurance?

14 A. If the Port fails to obtain a Hydraulic
15 Project Approval prior to commencing construction in
16 water construction, then that would be a problem.

17 Q. Right. Well, it's not only a problem, it
18 destroys reasonable assurance?

19 A. No. Well, I disagree.

20 Q. Well, you're saying here, aren't you, that
21 yes, we have reasonable assurance with this
22 certification being subject to the conditions in the
23 HPA?

24 A. The conditions of the HPA are complementary
25 to the conditions that are in the water quality

1 certification, but the water quality certification can
2 stand independently and does stand independently from
3 the Hydraulic Project Approval for purposes of
4 reasonable assurance.

5 Q. Well, I don't mean to talk around you or the
6 issue, but the reality is, you're relying upon the
7 conditions that you believe Fish and Wildlife will put
8 in the HPA to come to a reasonable assurance finding?

9 A. That is not correct.

10 Q. You don't care what the conditions are in the
11 HPA?

12 A. They're complementary to the conditions that
13 are in the 401 certification.

14 Q. That's not my question. My question is, you
15 don't care about the conditions in the HPA?

16 A. The conditions of the HPA will be what's
17 required by the Department of Fish and Wildlife. We
18 have numerous construction-related conditions in this
19 permit that address water quality concerns that aren't
20 necessarily directly related to fish, but they are
21 usually complementary and not contradictory.

22 So our consultant, Katie Walter, with Shannon
23 and Wilson, thoroughly reviewed the Natural Resource
24 Mitigation Plan and the plans for relocating Miller
25 Creek. She had identified some areas that were of

1 continue under the 401 certification if it does not get
2 its HPA?

3 A. If the Port is denied an HPA by Fish and
4 Wildlife, then that would be -- well, that would just
5 stop the project right there.

6 Q. It would stop it because Ecology would not
7 have reasonable assurance at that point?

8 A. It would stop it because they'd be in
9 violation of the state hydraulic code.

10 Q. Only for work in the stream?

11 A. Yeah, for work in the stream.

12 Q. And Ecology would not let the Port go forward
13 under the 401 certification without that HPA, isn't
14 that right?

15 A. Well, we couldn't let an applicant do work
16 that was illegal. They would have to have that
17 Hydraulic Project Approval to do that instream work.

18 Q. I'm not talking about instream work, I'm
19 talking about other work under the 401 certification.

20 MR. REAVIS: I'm just going to, for the
21 record, object to the question because it misinterprets
22 the legal meaning of the 401.

23 A. Ecology would have to look at the work that
24 the Port wanted to do, presuming they get their 404
25 permit from the Corps of Engineers that allows

1 concern to her in terms of how that would be managed,
2 and those issues were resolved. And we do have
3 reasonable assurance that as long as these conditions
4 are followed, we have reasonable assurance that water
5 quality standards will be met. We do not address
6 compliance with the hydraulic code.

7 Q. So the certification isn't subject to the
8 conditions in the HPA?

9 A. Once the Hydraulic Project Approval is
10 issued, it is our intent that the applicant should
11 comply with that permit.

12 Q. Right. The certification is subject to the
13 conditions in the HPA? That's what you said there,
14 isn't it, Mrs. Kenny?

15 A. That's correct.

16 Q. And you had to say that because in order to
17 have reasonable assurance, you had to have those
18 conditions in the HPA?

19 MS. MARCHIORO: Objection; vague.

20 A. As I have already stated, the conditions in
21 the Hydraulic Project Approval are complementary to the
22 conditions in the water quality certification that we
23 have for terms of assuring compliance with the water
24 quality standards.

25 Q. (BY MR. STOCK) Are you going to let the Port

1 discharge to wetlands. We'd have to look at the work
2 that they were proposing to do and the proximity of
3 that work to any work instreams. That work, we may
4 determine, could legally or rightfully proceed under
5 the 401 certification absent a Hydraulic Project
6 Approval.

7 Q. (BY MR. STOCK) So what is the reason that
8 you are conditioning this certification on the HPA?

9 A. Because that's the way it's always been done
10 by 401 reviewers. It's standard for us to incorporate
11 by reference other permits that have aquatic-related
12 conditions.

13 Q. And that's the only reason you did it,
14 because that's what you've always done?

15 A. Because the Hydraulic Project Approval
16 addresses impacts to aquatic resources. It's another
17 area where the applicant needs to comply.

18 Q. And if the applicant doesn't comply with the
19 HPA, it will be in violation of this 401 certificate,
20 isn't that correct?

21 A. Well, I think that's probably a legal issue,
22 because this is a cover letter. I don't believe
23 anywhere in the Order we refer to the Hydraulic Project
24 Approval.

25 Q. So it's not a part of the certificate?

1 A. It's not a -- I don't believe it's a part of
2 the Order itself. This is a separate administrative
3 Order. This is a cover letter.

4 Q. Is it a part of the certificate, the need to
5 obtain an HPA?

6 A. Not that I recall, that we put it in the
7 actual certificate. Unless it was somewhere in the
8 back, I don't believe that it is actually a part of the
9 Order itself.

10 Q. Okay, take a look at the first page of the
11 certificate of September 21. The last sentence on that
12 page says, "Work authorized by this Order is limited to
13 the work described in the JARPA, as amended, unless
14 modified by this Order or by conditions contained in
15 other permits sought for the Master Plan Update
16 Improvement projects."

17 Can this certificate be modified by other
18 permits?

19 A. Yes.

20 Q. What other permits can modify this
21 certificate?

22 A. We had made provisions to allow the next
23 round of the NPDES permit to make revisions to this
24 permit.

25 Q. So this certificate and the requirements of

1 authorized delegated state for purposes of the Clean
2 Water Act, so we would have to look to state law as
3 well as the Clean Water Act to determine if there was
4 violation.

5 Q. And once you determine there was a violation,
6 that would destroy reasonable assurance, would it not?

7 MR. REAVIS: Objection; vague.

8 A. I'm confused as to whether you're asking
9 about how Ecology would respond prior to issuance of
10 this permit or the basis of our decision, or what we
11 would do after issuance of the permit if we determined
12 there was a violation of the Clean Water Act.

13 Q. (BY MR. STOCK) Well, your determination that
14 there was reasonable assurance on August 10 was a
15 determination that the project would not result in a
16 violation of state water quality law?

17 A. That's correct.

18 Q. And your determination of reasonable
19 assurance on August 10 was that this project -- strike
20 that.

21 Your determination on August 10 that you had
22 reasonable assurance was also based upon your belief
23 that this project would not result in a violation of
24 the Clean Water Act?

25 A. That's correct.

1 the certificate can be modified by a subsequent NPDES
2 permit?

3 A. Yes.

4 Q. Turn to Page 2 of the certificate. At the
5 top of the page you identify various authorities. If a
6 component of this project is not in conformance with
7 the Clean Water Act, then is it fair to say that
8 Ecology would not have reasonable assurance?

9 A. That's a very broad statement, and any
10 determination that this project is not in compliance
11 with the Clean Water Act would have to be made under
12 specific circumstances.

13 Q. So you believe there are situations where
14 there can be violations of the Clean Water Act and
15 Ecology could still have reasonable assurance?

16 A. I didn't say that.

17 Q. Well, that's my question.

18 A. We have reasonable assurance, as we've issued
19 this permit. We don't believe that this permit
20 violates the Clean Water Act.

21 Q. If it does violate the Clean Water Act, you'd
22 agree that there wouldn't be reasonable assurance?

23 A. The Clean Water Act is certainly part of it.
24 There's also the State Water Pollution Control Law and
25 the regulations under that. And we are an EPA-

1 Q. And on August 10 when you determined that you
2 had reasonable assurance to issue the certificate, you
3 also believed that the project was in conformance with
4 the requirements to use all known available and
5 reasonable methods to prevent a controlled pollution of
6 state waters?

7 A. That's correct.

8 Q. So if a component of the project is not in
9 accordance with ACART, then you wouldn't have
10 reasonable assurance?

11 A. It depends on the project and the specifics
12 of the project and how one defines ACART.

13 Q. Sure. But at the time you issued the
14 certificate, you had concluded that the project was in
15 conformance with ACART, and on that basis and on the
16 basis that you had decided that it was in conformance
17 with the state water quality laws and the Clean Water
18 Act, you had reasonable assurance?

19 A. I did not make a personal determination as to
20 whether or not this project would meet that standard of
21 ACART.

22 Q. You didn't?

23 A. Those recommendations were made to me by the
24 Water Quality Program.

25 Q. And they told you that the project was in

1 conformance with ACART?

2 **A.** I don't recall that we discussed it in those
3 specific terms.

4 **Q.** But that was part of your decision and that's
5 why you've included it here in the Order?

6 **A.** That's a part of our -- again, our standard
7 boilerplate.

8 **Q.** Well, what does that say, it's a part of your
9 standard boilerplate? It's a part of your standard
10 boilerplate because the project has to be in
11 conformance with ACART in order for you to have
12 reasonable assurance.

13 **A.** That's what this condition or this statement
14 here appears to say.

15 **Q.** Do the groundwater quality standards in WAC
16 173, I think it's 200, apply? Strike that, let me ask
17 this question.

18 **In coming to your conclusion that this**
19 **project conformed with the water quality standards of**
20 **the state, did you consider the groundwater quality**
21 **standards set forth in the Washington Administrative**
22 **Code?**

23 **A.** We certainly considered impacts to
24 groundwater on -- I'm not seeing the specific
25 reference, up front here where we talk about water

1 **A.** Yes.

2 **Q.** In your review of the application, did you
3 conclude that there would be mixing zones?

4 **A.** WAC 173-201A allows for mixing zones for
5 short-term disruption of water quality standards, the
6 way I understand it. There is a boundary, and I don't
7 have a copy with me of 201, whatever it is --

8 **Q.** 060.

9 **A.** -- 201A to point you to it, but there are
10 certain distance limitations where beyond that if
11 there's an exceedance of the criteria, that would be
12 considered a violation. And Ecology used to issue
13 short-term water quality modifications for any activity
14 where there would be an exceedance of the criteria.
15 And the way I understand it, the rule was amended to
16 allow for small mixing zones for temporary
17 construction-related impacts.

18 **Q.** Well, my question is a simple one. Looking
19 at Sub (d) and Sub (g), I take it there are components
20 of this project where there are going to be mixing
21 zones?

22 **A.** "Mixing zone" is something that has a very
23 technical regulatory definition. There is the
24 potential, not the likelihood, that some of these
25 instream projects may result in a short-term exceedance

1 quality standards to groundwater standards, but I know
2 that we did consider impacts to groundwater.

3 **Q.** There is a reference later on in the
4 certificate to groundwater standards, and that's my
5 question here. You agree that the groundwater
6 standards in the WAC are a part of the state water
7 quality standards?

8 **A.** That's my understanding.

9 **Q.** And in coming to a reasonable assurance
10 determination on August 10, you took those groundwater
11 quality standards into consideration?

12 **A.** They were certainly considered I believe by
13 the Water Quality program staff who were working on
14 this.

15 **Q.** You wouldn't have given reasonable assurance,
16 would you, if you thought that the groundwater quality
17 standards were going to be violated by this project?

18 **A.** No.

19 **Q.** Turn to Page 3. Item (d), "In the monitoring
20 plan, the Port shall demonstrate to Ecology that any
21 mixing zone is minimized in conformance with WAC 173."
22 Do you see that?

23 **A.** I do.

24 **Q.** And then also in Subitem (g), it again refers
25 to the boundary of mixing zones. Do you see that?

1 in some area in some point of the project. There's the
2 potential but not a proven fact that exceedance will
3 occur.

4 **Q.** So in that case don't you grant a short-term
5 water quality modification?

6 **A.** We no longer grant short-term water quality
7 modifications because the rule was amended to allow for
8 a certain small mixing zone to allow for that
9 exceedance.

10 **Q.** So Ecology is expecting that there will be
11 mixing zones from construction of this project, and
12 that's why Ecology put in Subparagraph (d) and (g) on
13 Page 3?

14 **A.** The applicant is required to do everything
15 within their ability through best management practices
16 to prohibit or to prevent the situation where the water
17 quality standards will be exceeded. However, when
18 you're going into a stream and you're doing work and
19 you're pulling out bulkheads or, say, old timbers or
20 something from the side of a bank, there might be some
21 turbidity and sedimentation from that activity. It's
22 not uncommon for there to be some exceedance in a very
23 small area. And I can't speak to the Water Quality
24 Programs' rationale for how they changed their rule,
25 but there was some allowance for that.

1 However, beyond this particular distance,
2 depending on the stream and the size of water body,
3 that would be considered a violation. And if that
4 happens, then the project applicant or the -- you know,
5 whoever is doing work needs to stop that work, they
6 need to slow it down, they need to do whatever they
7 need to do to prevent that exceedance. And that's why
8 we required instream/shoreline monitoring plans to
9 ensure that they would have adequate procedures in
10 place to address any problems that occurred during
11 construction.

12 Q. So if I can cut through all of that, what I
13 understood you to say is that, yes, based upon the
14 Water Quality Program's experience, mixing zones are
15 expected to occur during the construction of this
16 project?

17 A. There's a likelihood that they may occur.

18 Q. Well, there's a substantial likelihood that
19 they will occur, isn't there, given the scope of this
20 project?

21 A. Given the nature of the work that they're
22 doing, it would not be surprising if there was some
23 turbidity created by the activities that they're
24 proposing.

25 Q. Right. There's a substantial likelihood that

1 minimize that mixing zone.

2 Q. Don't Ecology's own regulations with respect
3 to mixing zones require review and approval of mixing
4 zones?

5 A. Mixing zones are discussed in another area of
6 WAC 173-201A, but I believe that that's under a
7 separate intent.

8 Q. You agree that the regulations require review
9 and approval by Ecology of mixing zones under the WAC?

10 A. I am not an expert in the water quality
11 standards per se. These conditions were worked out
12 with the Water Quality Program, they're consistent with
13 what we have done in the past, and these are very
14 specific to these temporary construction projects.

15 Q. Take a look at 173-201A-100, 1 through 16.
16 You've seen that before, haven't you?

17 A. Yes.

18 Q. You've reviewed the water quality standards
19 set out in the WACs; correct?

20 A. Yes.

21 Q. And that review has included the WAC relating
22 to mixing zones?

23 A. This mixing zone is with regard to discharge
24 permits, general permits or orders as appropriate.

25 Q. Are you telling me that WAC 173-201A-100

1 there will be mixing zones on this project given the
2 scope of the construction?

3 A. There's a likelihood.

4 Q. It's a substantial likelihood, isn't it?

5 MS. MARCHIORO: Asked and answered.
6 Objection.

7 A. "Substantial" is a term with a value to it
8 that I can't measure until the Port gets out there and
9 starts constructing and we see how effective their BMPs
10 are.

11 Q. (BY MR. STOCK) Let me see if I can get this
12 agreement out of you. You agree that there's a greater
13 than 50 percent chance or probability that mixing zones
14 are going to occur on this project; that's a fair
15 assumption, isn't it?

16 A. I can't say.

17 Q. Well, that's why (d) and (g) is in there.

18 A. We expect that there will be some need for
19 mixing zones, and (d) and (g) are in there to say that
20 that mixing zone needs to be minimized to the smallest
21 mixing zone possible, that if there's -- and I describe
22 this in my Declaration -- that if there's X amount
23 given for the mixing zone but they can meet the
24 standard within 10 feet instead of 100 feet, they need
25 to do it within 10. So we've done everything we can to

1 doesn't apply to this 401 certificate? It does apply,
2 doesn't it?

3 A. I don't believe that's entirely correct.

4 Q. You're telling me that this WAC on mixing
5 zones doesn't apply to the 401 certification review
6 process here?

7 A. I'm saying that we adopted part of that
8 language, but that language I believe is more
9 appropriately directed to discharges related to point
10 source discharges of pollution versus a temporary
11 exceedance of the water quality standards related to
12 temporary construction activities.

13 Q. In your reasonable assurance review, did you
14 require any sort of review and approval of mixing zones
15 that were expected to occur through construction of
16 this project?

17 A. It's not required for temporary construction
18 activities. That's not required.

19 Q. Ms. Kenny, that's not my question. Please
20 listen to my question.

21 My question is, as part of your reasonable
22 assurance review, did you require any review and
23 approval of mixing zones?

24 A. No, because it was not required.

25 Q. Turn to Page 4 of the certification. The

1 very first sentence on Page 4, "This Order shall be
2 valid during construction of the project."

3 Do you see that?

4 **A.** I do.

5 **Q.** Is it your understanding that the Clean Water
6 Act also applies to long-term operation of the
7 facility?

8 **A.** I believe that's what's stated directly in
9 the Act.

10 **Q.** That's also true with respect to state water
11 quality standards, that state water quality standards
12 apply to long-term operation of the facility?

13 **A.** Any facility anywhere needs to comply with
14 the water quality standards that are in place at the
15 time.

16 **Q.** What do you mean "at the time"?

17 **A.** The water quality standards can be changed
18 and amended if there are new provisions, that the
19 facility needs to comply with what's current at that
20 particular point in time.

21 **Q.** Sure, I think we're saying the same thing.
22 You agree that the state water quality standards apply
23 to a long-term operation of the facility, whatever
24 those water quality standards are at the time?

25 **A.** Yes.

1 or disagree. If you want to ask a question, please
2 continue with the deposition.

3 **MR. STOCK:** Well, I don't think your
4 objection would be sustained so please watch your
5 objections.

6 **MS. MARCHIORO:** Can we take a break?

7 **MR. STOCK:** Sure.

8 (Recess taken.)

9 (Reporter read back as requested.)

10 **Q. (BY MR. STOCK)** I guess I didn't get an
11 answer to that question.

12 The reason you included in the August 10
13 certification the language that the "Order shall be
14 valid during construction and long-term operation and
15 maintenance of the project" was because that is
16 required by the Clean Water Act and the state water
17 quality standards?

18 **MS. MARCHIORO:** Object to the extent that it
19 calls for a legal conclusion.

20 **A.** This is language, again, that was a part of
21 the boilerplate created by Tom Luster. I believe that
22 language is in the Clean Water Act, but I would have to
23 go back and look to be sure.

24 **Q. (BY MR. STOCK)** What made you decide to
25 delete the phrase "long-term operation and

1 **Q.** And that's the reason why you included in
2 your August 10 certification in that first sentence
3 under Item 1 that the "Order shall be valid during
4 construction and long-term operation and maintenance of
5 the project"?

6 **MR. REAVIS:** Object to misreading the
7 document.

8 **A.** The August 10th version of the certification
9 states, "This order shall be valid during construction
10 and long-term operation and maintenance of the
11 project."

12 **Q. (BY MR. STOCK)** And I didn't misread it, did
13 I?

14 **A.** You read it appropriately.

15 **Q.** So you agree that Mr. Reavis's objection was
16 a needless objection?

17 **A.** I'm not qualified to determine whether a
18 counsel's objection is needless or not.

19 **Q.** Didn't make any sense to you, did it?

20 **A.** I am not going to answer that.

21 **MR. REAVIS:** Why don't we just move on with
22 the question instead of talking about it.

23 **MR. STOCK:** You agree your objection was
24 needless?

25 **MR. REAVIS:** I don't have any need to agree

1 maintenance"?

2 **A.** The changes that were made in the September
3 21st version of the certification were made to clarify
4 that language, to put some definition to what that
5 means.

6 **Q.** You deleted that phrase from the first
7 sentence of Paragraph 1 under Section B because the
8 Port asked you to delete it?

9 **A.** The changes that were made to the September
10 21st certification were the changes that were agreed to
11 during settlement discussions with the Port.

12 **Q.** Right. The Port asked you to delete that
13 phrase out of the first sentence of Section B1?

14 **A.** They asked and we agreed that that was
15 reasonable.

16 **Q.** Even though the Clean Water Act requires that
17 the certification apply to long-term operation and
18 maintenance?

19 **MR. REAVIS:** Objection; legal conclusion.

20 **A.** The September 21st version of the
21 certification still has that language in there, "This
22 Order shall be valid during long-term operation and
23 maintenance of the project."

24 **Q. (BY MR. STOCK)** But that language is now
25 modified, isn't it?

1 A. It is slightly modified.
 2 Q. It is modified, isn't it?
 3 A. It is modified.
 4 Q. So it's less of a standard than what was
 5 contained in the August 10 certification, isn't it?
 6 A. I don't believe so.
 7 Q. Well, how is it not?
 8 A. "This Order shall be valid during
 9 construction." The subparagraphs in the September
 10 21st certification then go on to define exactly what
 11 "construction" means. So in items -- go through those
 12 subparagraphs, we've defined, given clarity to what
 13 "construction" means. And then in this Condition F, we
 14 have -- well, we've defined that some of the conditions
 15 for wetland mitigation are in effect in perpetuity, and
 16 then we define how this long-term maintenance and
 17 operation applies as it relates to the NPDES permit.
 18 Q. Ms. Kenny, you have to agree with me that by
 19 agreeing to the Port's modifications to this Paragraph
 20 B1 where you have modified, to use your words, the
 21 phrase "long-term operation and maintenance," that this
 22 is a lesser time than what is required under the August
 23 10 certification?
 24 A. I don't agree.
 25 Q. Look at 1(c), look at 1(d). There's an

1 A. That's correct.
 2 Q. (BY MR. STOCK) It's not a construction
 3 activity, is it?
 4 A. It's related to construction activity and
 5 monitoring the impacts of that construction.
 6 Q. It's also related to long-term operation and
 7 maintenance subsurface utility lines?
 8 A. It says the plan shall remain in effect as
 9 specified, but in no event for a duration less than
 10 eight years.
 11 Q. Right. And so in Year 8 plus one day, under
 12 that provision the Port has the right to stop the
 13 monitoring, doesn't it?
 14 A. It could if it chose to.
 15 Q. That's right. And so that is less of a
 16 standard in terms of applying this certification to
 17 long-term operation and maintenance than what was
 18 contained in the August 10 certificate, isn't that
 19 right?
 20 A. It's certainly different.
 21 Q. It's a lesser standard, isn't it?
 22 A. I believe it provides more clarity.
 23 Q. Well, I'm going to stay on this until I can
 24 get an agreement out of you, because I think it's
 25 absolute.

1 eight-year time frame on those, isn't there?
 2 A. These are provisions that relate to
 3 activities that are directly related to construction
 4 activities, and those activities are not expected to
 5 continue indefinitely.
 6 Q. Potential contaminant transport to soil and
 7 groundwater via subsurface utility lines is a
 8 construction activity? Is that your testimony?
 9 A. What this condition --
 10 Q. Is that your testimony?
 11 A. If you'll repeat what your statement of my
 12 testimony is, I'll be glad to tell you if that's my
 13 testimony or not.
 14 Q. Is it your testimony that contaminant
 15 transport to soil and groundwater via subsurface
 16 utility lines is a construction activity?
 17 MR. REAVIS: Let me object to the fact that
 18 you're not reading the entirety of that provision.
 19 MR. STOCK: Would you like to read it,
 20 Mr. Reavis?
 21 MR. REAVIS: Yes. You read starting with
 22 "contaminant transport." But the full provision says,
 23 "The plan to monitor potential contaminant transport"
 24 shall be contained as specified, not contaminant
 25 transport.

1 You told me that under the September 21
 2 certification the Port of Seattle has the right to stop
 3 monitoring potential contaminant transport to soil and
 4 groundwater via subsurface utility lines in Year 8 plus
 5 one day. Do you recall that testimony?
 6 A. I do.
 7 Q. The Port of Seattle did not have that option
 8 under the August 10 certificate, did it?
 9 A. I'll have to refresh my memory of what the
 10 August 10 certification says.
 11 A. (Witness reviewing document). The September
 12 21st certification puts an eight-year parameter on that
 13 monitoring.
 14 Q. That's not an answer to my question.
 15 A. Would you repeat the question, please?
 16 (Reporter read back as requested.)
 17 A. That's correct.
 18 Q. (BY MR. STOCK) So it's a lesser standard in
 19 the September 21 certificate than the August 10
 20 certificate, isn't that right?
 21 A. Yes.
 22 Q. And that's also true with respect to 1(c),
 23 "the Surface Water and Ground Water Monitoring plan
 24 shall remain in effect as specified in that plan but in
 25 no event for a duration less than eight years."

1 Under that provision, the Port has the
2 option, in fact, it has the right in Year 8 plus one
3 day to stop that surface water and ground water
4 monitoring; correct?

5 A. Yes.

6 Q. And they didn't have that right, the Port
7 didn't have that right under the August 10 certificate;
8 correct?

9 A. Correct.

10 Q. And as a result of that provision, the
11 September 21 certificate is a lesser standard than the
12 August 10 certificate; correct?

13 MS. MARCHIORO: Can I ask you, I'm sorry,
14 which conditions you're referring to?

15 MR. STOCK: C.

16 MS. MARCHIORO: Thank you.

17 A. Yes.

18 Q. (BY MR. STOCK) Looking at Condition B1(f) on
19 the same page, am I to understand -- is it a correct
20 interpretation of that condition that this current 401
21 certificate can be amended by a future NPDES permit?

22 A. That is correct.

23 Q. And given that, can't the conditions of the
24 401 certificate be lessened because it can be modified
25 by a future NPDES permit?

1 a change to what we've approved.

2 Q. What sort of change?

3 A. A substantive major change to the project.

4 Q. Would switching over to a regional detention
5 facility for a storm water management at the site be a
6 substantive change in your mind?

7 A. I believe we already discussed the regional
8 detention facility in that light.

9 Q. Right. And you agreed that it would be?

10 A. Yes.

11 Q. And how about changes in the Low Flow
12 Analysis; do you agree that changes in the Low Flow
13 Analysis would also trigger this provision?

14 A. No.

15 Q. If the Low Flow Analysis is changed to where
16 there is a greater impact on low flow than what the
17 July 2001 Low Flow Analyses showed, don't you agree
18 that that is a sufficient enough change to require an
19 updated application to Ecology under this provision?

20 A. We have received the revised local plan on --
21 I have not reviewed it thoroughly nor has our
22 consultant, but it's my understanding that the impacts
23 have not increased.

24 Q. If impacts have increased, do you agree that
25 that requires a resubmittal of the application for 401

1 A. They could be, but that's not likely.

2 Q. You agree that the potential exists for the
3 conditions in the 401 certificate to be modified to
4 result in lesser protection of water quality because it
5 can be modified by a future NPDES permit?

6 A. In theory, the conditions could be modified
7 to a lesser standard.

8 Q. And that's because the standards for
9 reviewing and approving NPDES permits are different
10 than the standards for reviewing and approving 401
11 certifications?

12 A. I can't speak to the exact standards used for
13 reviewing 402 --

14 Q. Sure. At a minimum you know you don't need
15 reasonable assurance to issue a 402 permit?

16 A. That's my understanding.

17 Q. Item No. B3 on that page requires the Port to
18 submit an updated application to Ecology if the
19 information contained in the JARPA is altered by
20 subsequent submittals to the federal agencies and/or
21 state agencies.

22 What types of subsequent submittals are you
23 referring to there?

24 A. Without knowing what those submittals are, it
25 would be something along the lines that would result in

1 certification?

2 A. If, understanding that's a subjective if, not
3 a certainty, impacts had increased, we would evaluate
4 whether the Port had proposed adequate mitigation to
5 offset those impacts along with this revised low flow
6 plan.

7 Q. And require the Port to submit a new
8 application for 401 certification?

9 A. Not necessarily.

10 Q. You're saying no change in a Low Flow
11 Analysis would cause you to require the Port to
12 resubmit an application?

13 MS. MARCHIORO: Objection; mischaracterizes
14 the witness's testimony.

15 A. It depends on the order of magnitude of the
16 change and whether or not the Port has sufficiently
17 mitigated for those changes.

18 Q. (BY MR. STOCK) You received the revised low
19 flow plan when?

20 A. December 12th.

21 Q. You're sure about that date?

22 A. Pretty sure.

23 Q. That was a week ago today; correct?

24 A. That's correct.

25 Q. So last Thursday, Department of Ecology got a

1 copy of the low flow revised plan?

2 **A.** If that was last Thursday. Frankly I don't
3 remember without a calendar.

4 **Q.** Well, today is a Thursday, so if it was a
5 week ago it was a Thursday.

6 **A.** Whatever. It was December 12th, I remember
7 that. I don't remember the date.

8 **Q.** Have you opened it up to review it?

9 **A.** I cracked the cover enough to look at the
10 impacts to see that in Miller Creek the net impact was
11 zero. And because it arrived late in the day, I saw
12 that there were numbers for Des Moines Creek and Miller
13 Creek -- or I'm sorry, Walker Creek, but I didn't have
14 the opportunity to go back and compare that with the
15 previous numbers that we had.

16 I had been informed by the Port that those
17 numbers were expected -- the impact number was expected
18 to decrease or be less impact shown from the fill than
19 had been priorly calculated.

20 **Q.** Are changes to mitigation planned as a result
21 of that?

22 **A.** I don't know. I haven't looked at it.

23 **Q.** Do you agree that if there are changes to
24 mitigation, then that will require reapplication and
25 public notice?

1 new public notice to issue an amended 401 after it
2 issued the August 10 certification?

3 **A.** We may have -- I may have discussed it with
4 someone, but I honestly don't recall the specifics of
5 any discussion.

6 **Q.** You don't see that as an option now, do you?

7 **A.** Could you define what you mean by -- see what
8 as an option?

9 **Q.** Going out with new public notice on any
10 changes to the certification.

11 **A.** I don't see need for new public notice.

12 **Q.** Well, you haven't had enough time to review
13 the low flow plan to make that decision, have you?

14 **A.** No.

15 **Q.** But yet you don't see a need for public
16 notice? The bottom line I'm trying to get at is,
17 you're not even willing to consider whether public
18 notice is needed for a change to the low flow plan, are
19 you? That's not an option to you?

20 **A.** It's certainly an option that I'm willing to
21 consider.

22 **Q.** But you know it'll be shot down, don't you?

23 **A.** I don't see a need for, unless there's a
24 substantial major change in the scope of the project or
25 the impacts of an adverse nature that would warrant a

1 **A.** No.

2 **Q.** So if the Port is proposing less mitigation
3 now because impact to low flow has gone down, you're
4 not going to go out with new public notice?

5 **A.** I don't believe that would be warranted.

6 **Q.** So you're going to let the Port reduce the
7 amount of mitigation without going to public notice?

8 **A.** We haven't determined what we're going to do
9 because we haven't reviewed it. That review needs to
10 happen, and when it's complete we will know how we will
11 respond to those changes.

12 **Q.** There would be great resistance at Ecology,
13 wouldn't there, to go out with new public notice on a
14 change to this certification?

15 **A.** No.

16 **Q.** Well, there was resistance prior to September
17 21, wasn't there, in issuing the amended certification?

18 **A.** I don't recall that we ever discussed going
19 out on public notice.

20 **Q.** There were discussions within Ecology as to
21 whether public notice was needed to amend the August 10
22 certification, wasn't there?

23 **A.** Not that I recall.

24 **Q.** You don't recall participating in any
25 discussions on whether Ecology would have to provide

1 new public notice.

2 **Q.** Turn to Page 6. The first full paragraph
3 there, "No document, report or plan required by this
4 Order shall be deemed approved until the Port receives
5 written verification of approval from Ecology." What's
6 that in there for?

7 **A.** That was put in there to be very clear that
8 verbal approval of some report or word of mouth
9 approval was not sufficient. There actually had to be
10 a letter from Ecology stating in writing that a plan
11 had been approved.

12 **Q.** So is this in reference to the plans and
13 reports that the certification is requiring the Port to
14 submit?

15 **A.** That's correct.

16 **Q.** After the certification was issued?

17 **A.** That's correct.

18 **Q.** Why does the Port need to retain its right to
19 approve these plans and reports?

20 **A.** The Port isn't retaining any right to --

21 **Q.** I'm sorry, I misspoke. Why does Ecology
22 retain the right to approve these plans, reports that
23 the certification requires the Port to submit?

24 **A.** In some cases we said for very specific
25 conditions and technical requirements in our conditions

1 that we need to be assured have been fulfilled
2 adequately by the Port.

3 Q. Right. You retained control over those plans
4 that are being submitted after the certification
5 because you know there are technical requirements
6 required by Ecology in order to have assurance?

7 A. That's correct.

8 Q. In order to have reasonable assurance?

9 A. Yes.

10 Q. And you didn't have these reports obviously
11 on August 10 or September 21 when you issued the
12 certifications?

13 A. We didn't have the reports that we -- the
14 additional reports that we required or plans in the
15 certification at that time.

16 Q. Look under the Wetland, Stream and Riparian
17 Mitigation conditions, at the very bottom, 1(e).
18 Is there a requirement that the Port provide a map of
19 the location for the shade cloth in the revised NRMP?

20 A. Yes.

21 Q. And what's the importance of requiring the
22 Port to provide that map of the shade cloth?

23 A. There was a concern that in planting plants
24 for the new channel, if shading was not provided for
25 certain of the coniferous species, the fir and the

1 Q. It's a critical factor, isn't it?

2 A. Yes.

3 Q. And for that reason you are telling the Port
4 you need to revise your NRMP to show us where shade
5 cloth is going to be placed?

6 A. That's correct.

7 Q. And without that, your ability to come to a
8 conclusion on reasonable assurance with respect to the
9 temperature of the water in the relocated channel just
10 isn't there, is it?

11 A. I disagree.

12 Q. You've told me this is a critical component
13 of maintaining water temperature, and that is one of
14 the criteria for -- in the water quality standards;
15 correct?

16 A. You are trying to oversimplify or
17 overemphasize the importance of this one condition.

18 Q. All I'm trying to do, Ms. Kenny, is get to
19 the facts. And as I understand it, you need to know
20 where the Port is going to place that shade cloth in
21 order to know whether those plants, coniferous species
22 along the replaced channel, are going to survive.
23 That's what your testimony is; correct? It's a simple
24 question.

25 A. Well, the NRMP already identified that shade

1 cedar, that those small plants could be burned and
2 killed by the sun absent some shading to protect those
3 plants.

4 Q. What is the significance of those coniferous
5 species dying?

6 A. The mitigation plan sets out certain goals
7 for restoring riparian habitat along the Miller Creek
8 channel where it's relocated. That includes a mix of
9 both coniferous trees and willows and other types of
10 vegetation for a healthy mix of plant species.

11 Q. But why is that important to Ecology in terms
12 of water quality standards?

13 A. In trying to establish a healthy riparian
14 corridor that includes a healthy balance of plants,
15 when those plant species are fully grown, they will
16 provide shading which helps control temperature in the
17 water bodies in Miller Creek, Des Moines Creek, in
18 those areas. So when you've got tall plants adjacent
19 to the water, that provides shading which provides
20 cooling which is one of the criteria for the water
21 quality standards.

22 Q. So the plant life along the streams is
23 critical to maintaining the water quality standard with
24 respect to temperature?

25 A. That's one of the factors.

1 cloth would be placed over the new channel. What we
2 were asking for was more detail on the location of that
3 cloth and detail on how it would be installed and how
4 it would be maintained and removed so that our experts
5 who are reviewing this plan could review that and use
6 their expertise and their knowledge to determine
7 whether that plan was adequate.

8 Q. Right. We're getting too deep in to this.
9 This is shade cloth, and the bottom line is, your
10 experts needed to know where the shade cloth was going
11 to be placed in order to decide whether these baby
12 plants were going to make it?

13 A. Right.

14 Q. It's as simple as that?

15 A. That's correct.

16 Q. And you need those baby plants to grow up
17 into big plants to protect the water temperature in the
18 stream?

19 A. That's correct.

20 Q. And unless you know that those baby plants
21 are going to grow into big plants, you don't know
22 whether that temperature is going to be affected --
23 well, you know it is going to be affected; it's going
24 to rise, isn't it, if there isn't any plant life to
25 shade the stream?

1 A. If there's no vegetation to shade the stream,
2 there's likely to be an increase in temperature. The
3 absence of one plant species or another is not the only
4 reason why temperatures might rise in a stream, it's
5 one component of it.

6 Q. Right. And you needed the details on that
7 component to have reasonable assurance that the
8 temperature in that part of the stream wasn't going to
9 rise and violate state water quality standards, isn't
10 that right?

11 A. Yes.

12 Q. Turn over to Page 7, 1(g). You also required
13 as part of the revised NRMP that, "The Port shall
14 monitor hydrologic conditions of all wetlands downslope
15 of the Third Runway embankment in the Miller, Walker
16 and Des Moines Creek sub-basins;" is that right?

17 A. That's correct.

18 Q. And why is it important that the Port monitor
19 that the Natural Resources Mitigation Plan be revised
20 to provide that the Port shall monitor those hydrologic
21 conditions?

22 A. Let me reread the condition in its entirety.
23 (Witness reading document).

24 The importance for the monitoring is to
25 ensure that there's sufficient hydrology to allow

1 Q. And Ecology wants that information in order
2 to have reasonable assurance?

3 A. We want as complete a picture as we can get.

4 Q. Ecology wanted that information on the
5 hydrology of the wetlands downslope of the embankment
6 in the Miller, Walker and Des Moines Creeks in order to
7 come to reasonable assurance that water quality
8 standards wouldn't be violated in those wetlands, isn't
9 that right?

10 A. That's correct.

11 Q. And when did Ecology receive the revised
12 NRMP?

13 A. It was last month. It was in November around
14 November 19, I believe.

15 Q. How much monitoring of the wetlands downslope
16 of where the embankment is going to be with respect to
17 Miller, Walker and Des Moines Creek sub-basins has
18 there been in the past?

19 A. My understanding is that there's been
20 substantial monitoring, and that information was
21 provided to us and reviewed by Eric Stockdale.

22 Q. Is there a baseline already in place?

23 A. There's a substantial data bank or a
24 substantial amount of data in place to assess current
25 hydrology on the site.

1 wetland plants and wetland soil conditions to continue
2 after construction of the project.

3 Q. And why did the Department of Ecology want
4 the NRMP modified to require that?

5 A. I believe it was the determination of our
6 consultant, Katie Walter, that the Port did not have
7 sufficient plans in place for such hydrologic
8 monitoring.

9 Q. And you need that information to determine
10 whether there's sufficient hydrology to support the
11 vegetation in the wetlands; correct?

12 A. That's correct.

13 Q. And without that information, you can't make
14 a determination whether there is sufficient hydrology
15 in the wetlands to support the vegetation?

16 A. You can make a determination by going out and
17 actually looking at the wetland and comparing over time
18 the area of the wetland as it was prior to impact
19 versus post impact, and if there is insufficient
20 hydrology it's going to dry up and that wetland will
21 shrink. So you can actually measure it on the ground,
22 but the use of piezometers and shallow hand dug soil
23 pits is one more tool that helps provide clarity to the
24 natural processes that are actually occurring out
25 there.

1 Q. Has the Port started complying with this
2 provision?

3 A. It's my understanding that they were already
4 doing at least monthly, if not twice monthly
5 monitoring.

6 Q. This requires twice a month. Is the Port
7 doing that now?

8 A. I believe they are.

9 Q. Have you seen recent monitoring reports
10 relating to hydrologic conditions of the wetlands
11 downslope?

12 A. No, not to my knowledge.

13 Q. Aren't those reports to be sent to you under
14 the certification?

15 A. Well, it appears that they are to be
16 submitted to us on a monthly basis during that
17 monitoring period which would be November through May.

18 Q. Have you received any monitoring report under
19 this provision yet as of December 19?

20 A. I haven't received a monitoring report that's
21 come to me identified specifically as a monitoring
22 report. If anything was included in the revised
23 version of the NRMP regarding monitoring, I can't say
24 because I haven't looked at that document.

25 Q. Well, these monitoring reports would be

1 separate from the revisions to the NRMP. And my
2 question is, have you received the monitoring reports
3 for November?

4 **A.** Not to my knowledge.

5 **Q.** Do you have any knowledge that those
6 monitoring -- the monitoring has even occurred?

7 **A.** I haven't personally verified whether they're
8 doing that monitoring or not.

9 **Q.** So you don't know?

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

11 **Q.** Who should I ask?

12 **A.** You should ask the Port.

13 **Q.** What about if we send you a PDA request?

14 **A.** I don't have any documents in my hand that
15 are pertinent to this issue and I don't believe that
16 anyone else has received anything pertinent to this
17 issue.

18 **Q.** That's my question. You don't know?

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

20 **Q.** 1(h) requires the NRMP to be revised to
21 provide that wetland boundaries will be delineated at
22 years 5, 10 and 15; is that right?

23 **A.** That's correct.

24 **Q.** And that's both for the runway site and the
25 Auburn mitigation site; correct?

1 **Q.** Not a wetlands scientist?

2 **A.** That's correct.

3 **Q.** You're not an engineer?

4 **A.** I'm not an engineer.

5 **Q.** You're not a hydrologist?

6 **A.** No.

7 **Q.** You're not a hydrogeologist?

8 **A.** No.

9 **Q.** You're not a geologist?

10 **A.** No.

11 **Q.** You're not a botanist?

12 **A.** No.

13 **Q.** And you're not a fish biologist?

14 **A.** No.

15 **Q.** And you're not a chemist; is that right?

16 **A.** No.

17 **Q.** In that provision 1(h), it says that, "If the
18 delineation shows the wetland boundaries have decreased
19 then additional in-basin mitigation may be required by
20 Ecology." Shouldn't that provision say "shall" be
21 required by Ecology?

22 **A.** No, because there may be other things that
23 the Port could do to restore hydrology to a particular
24 wetland.

25 **Q.** Well, that's mitigation, isn't it, to restore

1 **A.** That's correct.

2 **Q.** What will cause a wetland boundary to
3 decrease?

4 **A.** It is my understanding as a person who is not
5 a specialist in wetland ecology that boundaries in
6 wetlands will decrease or increase based on the amount
7 of water gutting to the site.

8 **Q.** Is it your understanding that there is an
9 expectation on the part of Ecology that the wetlands
10 that will remain after the third runway is constructed
11 will decrease in size?

12 **A.** No.

13 **Q.** Why is there a requirement that those wetland
14 boundaries be delineated on a five-year basis?

15 **A.** The Port and Ecology have done their best to
16 review potential impacts related to the importation of
17 fill and the construction of new impervious surface.
18 Without monitoring in place, we can't verify whether
19 our assumptions are correct or not, and it's through
20 that monitoring that we can tell whether our
21 assumptions have been correct or not. And if they have
22 not been correct, then we can take some kind of
23 remedial action to correct any problem that we find.

24 **Q.** You're not a wetlands biologist, are you?

25 **A.** No.

1 hydrology to a wetland?

2 **A.** You could call it mitigation.

3 **Q.** Well, it is mitigation; agreed?

4 **A.** Yes.

5 **Q.** And if the delineation shows the wetland
6 boundaries have decreased then additional in-basin
7 mitigation should be required in order to have
8 reasonable assurance that water quality standards will
9 be met?

10 **A.** Yes.

11 **Q.** And that provision doesn't provide that, does
12 it?

13 **A.** That provision allows Ecology the discretion
14 to work with the Port to determine an appropriate
15 action.

16 **Q.** Right. It says it may be required; agreed?

17 **A.** That's what it says, "may."

18 **Q.** And that's a lesser standard than "shall."
19 You agree with that, don't you?

20 **A.** Yes.

21 **Q.** Turn over to Page 8, please. Under the
22 revision specified in Paragraph (j), midway down it
23 says, "The Port shall amend the monitoring condition in
24 Table 5.2-12 to read: 'Wetland indicator status of the
25 dominant noninvasive plant species shall not differ

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1 from pre-project conditions during or at the end of the
2 monitoring period." Do you see that?

3 A. I do.

4 Q. And what is the reason that Ecology wanted
5 that change made?

6 A. That is a question of a technical nature that
7 I don't believe I can answer.

8 Q. You authored this, didn't you?

9 A. I did not author this particular condition.

10 Q. Who authored this condition?

11 A. I believe this condition came from Katie
12 Walter at Shannon and Wilson.

13 Q. I thought you said you took the Shannon and
14 Wilson recommendations and revised them to be included
15 in the 401 certification.

16 A. I may have done some manipulating of the
17 wording, but I don't understand wetland indicator
18 status or I didn't play with the technical provisions
19 of what was there. So I would have -- I can't say
20 exactly what changes I might have made to this.

21 Q. So you have no idea what that's referring to?

22 A. Only in a general sense.

23 Q. Well, do you have any sense as to why that's
24 important to make that change for purposes of
25 reasonable assurance?

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1 A. Yes, I do. There are certain species of
2 plants that are found only in wetlands, and those are
3 called obligate species, I believe. And there are
4 certain plants that are found only outside of wetlands,
5 if they are in wetlands they will die, and they are
6 called upland species. And then there's a range of
7 plants in between, and they have particular names,
8 which is that wetland indicator status. So it's a
9 probability of whether or not this plant can grow in
10 wetlands or not.

11 So the "Wetland indicator status of the
12 dominant noninvasive plant species shall not differ
13 from pre-project conditions during or at the end of the
14 monitoring period. Each vegetative strata (trees,
15 shrubs and emergents) shall be assessed separately, and
16 have separate conclusions."

17 So one would look at, say, if in the
18 da-da-da, but it's not called emergent. In the
19 emergent strata, which is more of your low growing
20 vegetations like skunk cabbage, if they were to look at
21 the number of skunk cabbage and to see that they had
22 declined or they had been replaced by plants that were
23 only upland plants, then that would indicate that
24 there's a problem.

25 Q. Are you aware of any monitoring of the

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1 wetlands to establish a baseline on wetland indicator
2 status of plant species prior to the start of
3 stockpiling?

4 A. I can't address -- I have no knowledge of
5 that.

6 Q. Who would?

7 A. Probably Eric Stockdale. Certainly Jim
8 Kelley with the Port, or Parametrix.

9 MS. MARCHIORO: Kevin, can you give me an
10 idea of the duration?

11 MR. STOCK: Well, I thought you said she
12 wants to get out of here at 4:30.

13 MS. MARCHIORO: I'm just trying to get an
14 indication if we're going to return, because I'd like
15 not to burden her time unduly.

16 MR. STOCK: There is no question that I will
17 not finish today. I am on Page 6 of a 15-page outline
18 that should give you some indication that we won't
19 finish today at 4:30. So we can find a mutually
20 convenient time for all of us to come back and finish
21 you up.

22 MS. MARCHIORO: I'm curious about that second
23 day, though. The expectation would be --

24 MR. STOCK: Geez, you know, Joan, you want
25 more --

1 MS. MARCHIORO: Like you want out of Ann.

2 MR. STOCK: Right. It will be between a half
3 day and a day, and that's the best I can give you guys
4 right now. So we'll find a mutually convenient time.

5 THE WITNESS: Yeah. Basically not until
6 after the first of the year would be a time that would
7 work for everyone involved.

8 Q. (BY MR. STOCK) Let's try to get through as
9 much as we can, though.

10 A. Yes.

11 Q. Look at Condition (k) on Page 8.

12 A. Uh-huh.

13 Q. What is this provision that needs to be
14 changed in the Natural Resources Mitigation Plan?

15 A. This is an indicator status, one of the
16 indicators that wetland biologists use to determine
17 hydrology. And this is actually an instance where we
18 had made a mistake in the original certification, and
19 we caught that mistake and made the condition more
20 stringent.

21 Q. Okay, that's where I was going to go. This
22 is a change from the August 10 certification?

23 A. That's correct.

24 Q. The August 10 certification says what?

25 A. Sixteen inches.

1 Q. That groundwater shall be within the upper 16
2 inches?

3 A. Right. Let me read -- the August 10th
4 certification says, and I'll read the part that is in
5 quotes, "Other wetlands with predominantly mineral
6 soils shall have soils saturated within the upper 16
7 inches to mid-April in years of normal rainfall."

8 Q. And it was changed in the September 21
9 certification to say within the upper 10 inches?

10 A. That's correct.

11 Q. And actually, that is a lesser standard?

12 A. No.

13 Q. If there's -- explain to me why it's not.

14 A. You measure in a hole in the ground. Picture
15 a hole. You're measuring down. So 16 inches is 16
16 inches down from the surface of the hole. That means
17 your water is down 16 inches in the hole. If it's 10
18 inches, it's only 10 inches from the hole.

19 Q. So there's more water --

20 A. There has to be a higher level of water.

21 Q. More water there, that's why you're saying
22 it's a stricter standard here?

23 A. That's what I'm saying. There's more water
24 there.

25 Q. So what was the reason for changing it from

1 Q. And there was a concern on the part of
2 Ecology that that channel was -- or could go dry based
3 upon comments by NHC?

4 A. I don't recall if -- if you mean NHC,
5 Northwest Hydraulics --

6 Q. Yes.

7 A. -- had that comment specifically. I think
8 that was a comment raised by Diane Sheldon. I don't
9 recall specifically who made that comment, but that was
10 in response to those concerns along those lines.

11 Q. And it's self-evident, but I need for you to
12 say it on the record. If the relocated channel goes
13 dry, that will result in a violation of state water
14 quality standards; correct?

15 MS. MARCHIORO: Objection. Could you state a
16 reason for why it would go dry? I'd have a better way
17 to state the objection.

18 MR. STOCK: Just state your objection. Vague
19 or whatever you want to say.

20 MS. MARCHIORO: I'm sorry. Vague, crazy.

21 MR. STOCK: But it's so self-evident, Joan, I
22 don't know why you're objecting.

23 Q. (BY MR. STOCK) But in any event, Ms. Kenny,
24 do you agree that it would be a violation of state
25 water quality standards for that relocated channel of

1 the August 10 certification to the September 21
2 certification?

3 A. That was strictly to correct an error that we
4 had made.

5 Q. How was that error made?

6 A. It may have been a typo.

7 Q. Was it?

8 A. I don't know. It was something caught after
9 the certification was issued.

10 Q. The last reference on that Page 8 regarding
11 the Vacca Farm Mitigation Site requires the NRMP to be
12 revised to state that the "Observable surface flow must
13 be present in the created channel at all times."
14 What's that in reference to?

15 A. That was another performance standard added
16 to ensure that if there -- there would be observable
17 flow of water in the channel at all times to verify
18 that that channel was functioning well enough to
19 support a stream.

20 Q. Right. That's Miller Creek; right?

21 A. That's correct.

22 Q. And that's the newly-created channel for
23 Miller Creek?

24 A. That's the newly-created relocated channel,
25 right.

1 Miller Creek to go dry?

2 A. Only if it went dry through some fault in
3 design of the creek, not if it was a year or ten years
4 in a row where there was no rain and the creek
5 naturally dried up itself.

6 Q. Well, the relocated channel is a part of the
7 mitigation, is it not?

8 A. It is.

9 Q. And as part of the mitigation, in order to
10 have reasonable assurance, you want to make sure that
11 that channel doesn't go dry?

12 A. We want to ensure that that channel will
13 function as a natural creek bed to support whatever
14 water is there.

15 Q. Has Miller Creek ever gone dry, as far as you
16 know?

17 A. Not to my knowledge. I couldn't say with
18 certainty.

19 Q. And so an appropriate mitigation plan that
20 calls for relocating a channel of Miller Creek will
21 provide that that relocated channel will not go dry,
22 and that's why you've got this Condition (o)?

23 A. As long as there's water in the creek to be
24 conveyed through that channel, that channel should
25 allow that water to go through and not just sink into

1 the subterranean ground and disappear.

2 Q. Right. There has to be an observable surface
3 flow present in the created channel at all times in
4 order for Ecology to have reasonable assurance, isn't
5 that right?

6 A. That's correct.

7 Q. And the Natural Resources Mitigation Plan
8 that the Port submitted in which Ecology relied upon to
9 issue the certification didn't have that requirement in
10 it, did it?

11 A. I don't recall specifically if it did or not.
12 It must not have had it in there if that was a
13 condition that was recommended by our wetlands
14 specialist to be a part of the certification.

15 Q. Right. It wasn't in the plan when you issued
16 the certification, and that requirement is needed for
17 reasonable assurance, isn't that right?

18 A. It's one of the factors that's needed for
19 reasonable assurance.

20 Q. Without it you don't have reasonable
21 assurance with respect to the relocated channel of
22 Miller Creek; is that right?

23 A. That's correct.

24 Q. Turn to Page 9. The certification requires a
25 submittal of a Revised Mitigation Plan; is that right?

1 that an applicant intends to irrigate, then we want to
2 see that irrigation system shown on the plan sheet and
3 then discussed as well in the Natural Resource
4 Mitigation Plan so that we can know -- our wetland
5 experts can assess whether that proposal to irrigate
6 looks reasonable or not.

7 Q. Sure. Without that information you agree
8 that there's no way that Ecology's wetland experts can
9 decide whether the irrigation system is appropriate or
10 not?

11 A. That's correct.

12 Q. You can't decide without that information on
13 the irrigation system whether that irrigation system is
14 sufficient to support the mitigation plan; correct?

15 A. That's correct.

16 Q. And the irrigation system for the mitigation
17 plan is a key component for having reasonable
18 assurance?

19 A. It's one component of having reasonable
20 assurance.

21 Q. Without the information on the irrigation
22 plan, there's no way that you can say that that
23 irrigation system is sufficient to support the
24 mitigation plan, and if you can't say that the
25 irrigation system is sufficient to support the

1 A. That's correct.

2 Q. And the Port had to submit that revised NRMP
3 by December 31 under the certification; correct?

4 A. They did.

5 Q. And they have submitted that plan?

6 A. They have.

7 Q. And the revised plan sheets are to address
8 the corrections required in Attachment B to the
9 certification; is that right?

10 A. That's correct.

11 Q. Let's turn to Attachment B. The first
12 revision to the NRMP Plan Set on Sheet 3 requires that
13 the Plan B revised showing design of irrigation system
14 and discuss irrigation plan in NRMP; is that right?

15 A. That's what it says.

16 Q. Why was it important to Ecology to have the
17 revised sheet show the design of the irrigation system
18 and to discuss the irrigation plan?

19 A. First let me say about this Attachment B,
20 these were all comments provided by our consultant,
21 Katie Walter, of Shannon and Wilson, and I am not
22 familiar with the reason behind each one of these
23 separate requirements in here, or concerns.

24 In general, if there's some indication on a
25 plan sheet or some verbal indication that we've had

1 mitigation plan, there's no way you can have reasonable
2 assurance, isn't that right?

3 A. In a general sense.

4 Q. Well, and specifically here with respect to
5 this irrigation system?

6 A. With respect to a particular irrigation
7 system identified for a particular section of a very
8 large, complex mitigation project.

9 Q. Right. And in particular, this was for the
10 Miller Creek Relocation and Floodplain Enhancement?

11 A. That's correct.

12 Q. And without the information on that
13 irrigation system, you couldn't have reasonable
14 assurance that that irrigation system was appropriate
15 to support the mitigation for the Miller Creek
16 relocation and floodplain?

17 A. That's correct.

18 Q. Take a look at the requirement that the Sheet
19 TE1 be changed to note how the ditches will be blocked
20 to prevent sediment migration. Tell me what that's
21 about.

22 A. Once again, I was not responsible for
23 preparing this language or reviewing these sheets, bu
24 TE I believe stands for temporary erosion, and that
25 would be Sheet 1 of that packet of sheets. And there

1 was apparently a concern that the sheet did not show
2 adequately what the plans were to prevent sediment
3 migration.
4 Q. Right. And that's a critical component of
5 water quality standards, is it not?
6 A. Yes.
7 Q. The sediment control standards?
8 A. Yes.
9 Q. You're familiar with those?
10 A. Yes.
11 Q. And so until Ecology's experts saw how the
12 ditches will be blocked to prevent sediment migration,
13 there was no way that Ecology's experts could have
14 reasonable assurance that the sediment control
15 standards in the WAC would not be violated?
16 A. Yes. I think maybe she should reread the
17 question. It was a long question.
18 (Reporter read back as requested.)
19 A. Yes, or I agree.
20 Q. (BY MR. STOCK) Let's look down to the
21 changes that were required under Appendix B of the plan
22 sheets, Miller Creek - Instream and Buffer
23 Enhancements.
24 What is the revision to Sheet C3 that is
25 being required, and Sheet C7 also?

1 stream diversion structure and flow dispersion
2 structure."
3 So these were I guess conditions and
4 information to give additional detail on exactly how
5 the stream would be diverted -- I presume, and I don't
6 know without looking at it -- would be diverted from
7 the old channel of the creek into the new channel.
8 Q. You can look at it if you want because I have
9 the sheets here, but --
10 A. I don't want to.
11 Q. I know, it's 4:15, isn't it? But the sheets
12 are here if you need to look at them, and you may be
13 able to answer my question without looking at them.
14 My question is, you agree that without the
15 details for the stream diversion structure and flow
16 dispersion structure, there's no way to determine from
17 a reasonable assurance standpoint that that stream
18 diversion won't result in a violation of state water
19 quality standards?
20 A. I agree in the absence of details it's
21 difficult to make an assessment as to whether or not
22 there would be potential impact to water quality.
23 Q. Right. To put it more simply, you need the
24 details of the stream diversion structure and flow
25 dispersion structure to have reasonable assurance that

1 A. I recall that issue, discussing that issue
2 with both Katie and with Jim Kelley. It wasn't clear
3 from these plan sheets how the Port or the Port's
4 consultants would actually access the stream area to do
5 the work because along portions of Miller Creek the
6 stream is abutted by wetlands. So we wanted to know,
7 how are you going to get heavy equipment into this area
8 to do the instream work that you have proposed to do,
9 and we asked them in these sheets to provide that
10 detail.
11 Q. And you agree that in the absence of that
12 detail given that Miller Creek in this area is abutted
13 by wetlands, there's no way for you to have reasonable
14 assurance that water quality standards won't be
15 violated in regard to this Miller Creek instream and
16 buffer enhancements?
17 A. I agree.
18 Q. Sheet C4, tell me what the revision is about
19 there.
20 A. Well, I'm not sure what Sheet C --
21 Q. I've got them here if you need to take a
22 look.
23 A. The reference is Sheet C4 refers to Sheet TE2
24 which is a part of the Appendix B. And the comment
25 there is, "Provide revised sheet showing details for

1 state water quality standards won't be violated?
2 A. We need those details.
3 Q. For that purpose?
4 A. For that purpose.
5 Q. Okay, turn over to Page 2 of Attachment B,
6 and let's focus on Sheet L3.
7 A. Uh-huh.
8 Q. What is the revision needed to L3?
9 A. I remember -- L3? Okay, L3 says, "It is
10 unclear how much of this area will be cleared. Provide
11 revised sheet with correct cross-hatching in wetland."
12 So there must have been a problem with the
13 type of cross-hatching or marking used on that plan
14 sheet that showed what action was occurring in the
15 wetland area.
16 Q. Let me show you Sheet L3 from the December
17 NRMP. What is the area we're talking about?
18 A. I can't say.
19 Q. By looking at L3 you can't say?
20 A. Not without consulting with Katie Walter to
21 figure out which area she was concerned about. That
22 was her comment. There's some area in there that she
23 felt was not correctly marked.
24 Q. Well, how did the Port know what to do with
25 respect to L3 then?

1 A. I believe that that was discussed in a
2 meeting with Jim Kelley. We went through the various
3 sheets and pointed out areas where we had concern, and
4 he agreed that it was unclear and it would be
5 corrected.

6 Q. Well, it's talking about the area, the
7 wetland and riparian buffer around wetland R8, isn't
8 it?

9 A. Kevin, I don't know with certainty exactly
10 which area. That was a comment provided by Katie
11 Walter.

12 Q. All right, turn over to Page 3 of Attachment
13 B and let's talk about Appendix D to the NRMP Plan
14 Sets, Replacement Drainage Channels and Restoration of
15 Temporarily Impacted Wetlands. What is the revision
16 that is necessary to Sheet C3?

17 A. I believe that the sheet did not clearly
18 indicate how water would be channeled to Wetlands 11
19 and 9 after construction was completed.

20 Q. And you agree that without that information
21 clarifying how Wetlands 11 and 9 would be
22 hydrologically supported after construction, there's no
23 way that you could have reasonable assurance that state
24 water quality standards would not be violated with
25 respect to wetland 11 and Wetland 9?

1 A. Yes.

2 Q. What's the revision needed on Sheet C7? Is
3 it the same type of issue?

4 A. It's the same issue of whether or not -- if
5 the temporary erosion and sedimentation controlled
6 channel is removed after the whole project is complete.
7 It apparently currently drains to Wetland 44a, so the
8 question is how will the hydrology be maintained to
9 that wetland.

10 Q. Right. What's going to support Wetland 44a
11 if that TESC channel is removed after construction;
12 that's the issue?

13 A. That's correct.

14 Q. And unless Ecology knows the answer to that
15 question, Ecology can't have reasonable assurance that
16 state water quality standards won't be violated with
17 respect to Wetland 44a after completion of
18 construction; correct?

19 A. That's correct. I would like to add that
20 almost all of these points that are in this appendix
21 were discussed with the Port, and they did provide us
22 with verbal answers as to how these issues were
23 resolved or would be resolved or what their plan was.
24 And they agreed that there were instances where their
25 plan sheets were not specific enough, but they did --

1 Q. And that's why you put it in the 401
2 certification?

3 A. That's why we put it in the 401, was to close
4 that loop between those verbal assurances from
5 Mr. Kelley and our discussions with Mr. Kelley and to
6 ensure that gap was closed between what we had been
7 told versus what actually appears in the plan sheets
8 that are used for construction purposes.

9 Q. How about the revision needed on Sheet C8 in
10 Appendix D? What's that about?

11 A. There apparently is a discharge to a wetland
12 through a drainage channel. And the language there
13 states, "Address how often these structures will be
14 monitored and how modifications will be made if a
15 problem is identified. Provide information in note on
16 revised sheet."

17 The goal there, again, is make sure hydrology
18 is maintained to those wetlands and that those channels
19 are -- and any structures are appropriately monitored
20 and maintained.

21 Q. And that's in reference to the wetlands
22 depicted on Sheet C8?

23 A. Well, I would believe that is the case.
24 Right. It would be this detail in the upper right-hand
25 corner that shows this flow dispersal trench. This is

1 more of a generic detail.

2 Q. Right. And the issue was, how was that
3 discharge structure going to control the flow to the
4 wetland; correct?

5 A. Well, how the structure would be monitored
6 and how modifications would be made if a problem is
7 identified.

8 Q. I'm referring to the first sentence, "Clarify
9 how the drainage channel discharge structure controls
10 flow to the wetland."

11 You're telling the Port you need more
12 information to see how this drainage channel discharge
13 structure is going to control the flow to the wetland;
14 correct?

15 A. I believe that was Katie Walter's concern.
16 She didn't understand exactly what this drawing meant
17 here and wanted more detail.

18 Q. Right. Without that detail, you and she
19 couldn't come to a determination of how that wetland
20 was going to be supported hydrologically?

21 A. I agree.

22 Q. And you needed that information to have
23 reasonable assurance that the wetland would be
24 supported hydrologically and that state water quality
25 standards wouldn't be violated; correct?

REPORTER'S CERTIFICATE

1 A. That's correct.
 2 Q. What did you do to prepare for the deposition
 3 today?
 4 A. I met with my attorney, Joan Marchioro, for a
 5 short while. I attended a training that Ms. Marchioro
 6 did at our office for Ecology staff that are involved
 7 in the third runway, and I reviewed my Declaration and
 8 Tom Luster's Declaration.
 9 Q. Did you meet with any Port attorney?
 10 A. No.
 11 Q. Have you talked to anyone about your
 12 deposition today other than Ms. Marchioro?
 13 A. Only in passing.
 14 Q. What did you say and to whom?
 15 A. Oh, my deposition's on Thursday. I can't
 16 wait.
 17 (Discussion off the record.)
 18 (Deposition adjourned at 4:30 p.m.)
 19 (Signature reserved.)
 20
 21
 22
 23
 24
 25

1
 2
 3 I, DIANE MILLS, the undersigned Certified Court
 4 Reporter and Notary Public, do hereby certify:
 5 That the testimony and/or proceedings, a transcript
 6 of which is attached, was given before me at the time
 7 and place stated therein; that any and/or all
 8 witness(es) were by me duly sworn to tell the truth;
 9 that the sworn testimony and/or proceedings were by me
 10 stenographically recorded and transcribed under my
 11 supervision, to the best of my ability; that the
 12 foregoing transcript contains a full, true, and
 13 accurate record of all the sworn testimony and/or
 14 proceedings given and occurring at the time and place
 15 stated in the transcript; that I am in no way related
 16 to any party to the matter, nor to any counsel, nor do
 17 I have any financial interest in the event of the
 18 cause.
 19 WITNESS MY HAND AND SEAL this 26th day of
 20 December 2001.
 21
 22 DIANE MILLS, CSR# MI-LL-SD-M380N3
 23 Notary Public in and for the State
 24 of Washington, residing in King
 25 County. Commission expires 10/10/02.

CORRECTION & SIGNATURE PAGE

1
 2
 3 RE: AIRPORT COMMUNITIES COALITION VS. STATE OF
 4 WASHINGTON, et al.
 5 BEFORE THE POLLUTION CONTROL HEARINGS BOARD
 6 DEPOSITION OF: ANN KENNY; DECEMBER 20, 2001
 7
 8 I, ANN KENNY, have read the
 9 within transcript taken DECEMBER 20, 2001, and the same
 10 is true and accurate except for any changes and/or
 11 corrections, if any, as follows:
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21
 22 Signed at _____, Washington,
 23 on the ____ day of _____, 2001.
 24 _____
 25 ANN KENNY

AR 028747

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AR 028763

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)

Plaintiff(s),)

vs.) PCHB No. 01-160

STATE OF WASHINGTON,)

DEPARTMENT OF ECOLOGY; and)

THE PORT OF SEATTLE,)

Defendant(s).)

DEPOSITION UPON ORAL EXAMINATION

OF

ANN E. KENNY

Volume 2

10:00 A.M.

FEBRUARY 20, 2002

1325 FOURTH AVENUE, SUITE 1500

SEATTLE, WASHINGTON

KATHY HAUCK, HA-UC-KK-L4210H

AR 028764

FEB 20 2002

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FEB 27 2002

1 SEATTLE, WASHINGTON; FEBRUARY 20, 2002

2 10:00 A.M.

3 --oOo--

4
5 ANN E. KENNY,
6 sworn as a witness by the Notary Public,
7 testified as follows:
8

9 EXAMINATION

10 BY MR. STOCK:

11 Q. Good morning, Ms. Kenny.

12 A. **Good morning.**

13 Q. You understand that this is a continuation of
14 the deposition started on December 20th?

15 A. **I do.**

16 Q. And you also understand that you continue to
17 be under oath?

18 A. **I do.**

19 Q. Tell me what you have done with respect to
20 the Port's Third Runway Project since your last
21 deposition.

22 MS. MARCHIORO: Objection, vague.

23 MR. STOCK: How is it vague?

24 MS. MARCHIORO: What you have done, I guess
25 can you be a little more specific?

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11 446 E-mail dated 7-29-01 from Ann Kenny to
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1 MR. STOCK: I can't be.

2 Q. (BY MR. STOCK) Go ahead and answer the
3 question.

4 A. **Well, there are maybe several areas that I**
5 **can break it down to. There are administrative**
6 **functions that I continue to perform on the project,**
7 **such as public records management, responding to public**
8 **disclosure requests. I have been involved in assisting**
9 **Ray Hellwig in preparing the interlocal agreement that**
10 **we've signed with the Port.**

11 **There have been technical issues that I have**
12 **been tracking that are related to the Port's compliance**
13 **with various conditions of the 401 that we issued and**
14 **then reissued on September 21st, so various documents**
15 **have come in in compliance with conditions of the 401**
16 **and I have been responsible for parcelling out those**
17 **documents to the appropriate technical staff for**
18 **review.**

19 Q. Have you done anything else with respect to
20 the Port's Third Runway Project since your last
21 deposition?

22 A. **I have attended one or two, three meetings**
23 **with Port staff on various technical issues.**

24 Q. Anything else?

25 A. **Not that I can think of at the moment, but I**

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2 (Pages 193 to 196)

1 may as we go along here.

2 Q. Have you had a site visit since our last
3 deposition?

4 A. I don't think so. I have been out to the
5 Port's West Side office for a meeting, but I'm not
6 sure. There was a site visit that I did with Ed Abbasi
7 and Rod Thompson, but that may have been in December, I
8 just can't recall right now.

9 Q. Your December deposition was taken on
10 December 20, and I believe that your site visit with
11 Mr. Abbasi and Mr. Thompson occurred on December 24.
12 Does that refresh your recollection?

13 A. No.

14 Q. It wasn't the day before Christmas?

15 A. I don't remember the day before Christmas.

16 Q. What was the purpose of the site visit that
17 you had with Mr. Abbasi?

18 A. And Mr. Thompson?

19 Q. Yes.

20 A. The purpose of that visit was to discuss the
21 fill criteria and familiarize Mr. Abbasi and
22 Mr. Thompson with the airport site and the areas where
23 the fill would be placed, assuming that the Port
24 received their 404 and all the legal issues are
25 resolved.

1 A. We went to the southwest -- well, just an
2 area southwest of the terminal where they are doing
3 some construction and looked at piles of dirt and their
4 construction management practices for how they manage
5 soils that they are excavating on site.

6 Q. Was this part of the South Terminal Expansion
7 Project?

8 A. I believe so, I'm not sure.

9 Q. And you were examining piles of excavated
10 soil?

11 A. Correct.

12 Q. And what was the reason you were examining
13 these piles of excavated soil in the area of the South
14 Terminal Expansion Project?

15 A. Well, it was a visual examination only from
16 the van, and just looking at their best management
17 practices for how they had the soil stockpiled on site.

18 Q. Was that stockpiled soil going to be moved
19 over to the embankment for the Third Runway Project?

20 A. I don't believe so. I'm not sure that they
21 had made that determination, but I can't say what their
22 plan was for it.

23 Q. Was there any discussion in that regard?

24 A. No.

25 Q. What observations did you make of these

1 Q. Which Mr. Thompson are you referring to?

2 A. Rod.

3 Q. And why is Rod Thompson involved at this
4 point?

5 A. Rod is a hydrogeologist with Ecology, and he
6 is reviewing the Port's embankment seepage monitoring
7 plan that looks at surface water and groundwater.

8 Q. Is this seepage and monitoring plan that
9 Mr. Thompson is reviewing the plan that the Port was
10 required to submit under the September 21 401
11 Certification?

12 A. It's the plan that they were required to
13 submit in Section E under the fill criteria in the
14 September 21st 401.

15 Q. Was anyone else on this site visit with
16 Mr. Abbasi, Mr. Thompson and yourself?

17 A. There was -- I believe it was Paul Agid, with
18 the Port, Beth Clark, and Robin Kordik.

19 Q. Where did you go and what did you see?

20 A. We did a general drive-through of the Port's
21 facility focusing primarily on the west side where the
22 embankment would be placed, and then we went down to
23 the golf course, Tyee Golf Course, and looked around
24 down there.

25 Q. Anywhere else?

1 stockpiled soils in the area of the South Terminal
2 Expansion Project?

3 A. Well, they were there on the ground, the
4 construction area was contained by construction or
5 chain-link fencing, and that's about all I recall right
6 now.

7 Q. Did you observe any best management practices
8 with respect to these piles of excavated soil?

9 A. I don't recall.

10 Q. You don't recall any best management
11 practices that were in use with respect to these
12 excavated piles of soil?

13 A. I don't recall any specific BMPs, but I don't
14 recall anything coming to mind in my recollection now
15 that struck me as being out of order or inappropriate.

16 Q. Why were you inspecting the Tyee Golf Course
17 area on the site visit?

18 A. Oh, simply to familiarize both Mr. Thompson
19 and Mr. Abbasi with the layout of the site and to look
20 at the area where the SASA, S-A-S-A, facility would be
21 constructed to familiarize them with the location of
22 Tyee Pond and Northwest Pond, the east and west branch
23 of Des Moines Creek.

24 Q. Why did you consider it important to show
25 Mr. Abbasi and Mr. Thompson Tyee Pond?

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1 A. They have seen various site drawings of the
2 facility. I'm not sure how -- I know Mr. Thompson
3 probably had never been out on the site prior to that
4 visit, and Mr. Abbasi may have been out there, but Tyee
5 Pond is a landmark on the ground that's referred to
6 relative to -- and also there is a weir at the base of
7 the pond, you know, a meter that allows the water
8 through that pond, that controls -- there is a control
9 structure at that pond that they can shut off if there
10 is a spill upstream and then it's piped into Des Moines
11 Creek.

12 Q. What is Mr. Abbasi's involvement?

13 A. He is an engineer with the Department of
14 Ecology, and he is now the permit manager for the
15 Port's NPDES industrial stormwater permit.

16 Q. What were the meetings about that you
17 attended with the Port since your last deposition?

18 A. There was one meeting to discuss the terms of
19 the interlocal agreement with the Port to discuss basic
20 accounting -- the accounting practices that we would
21 use and the codes that we would use to charge work to.

22 Q. Any other discussion at that meeting?

23 A. No, it was pretty much limited to simply the
24 interlocal agreement.

25 Q. Who was at that meeting?

1 A. Elizabeth Leavitt, Robin Kordik, and a woman
2 from their accounting department, and I don't recall
3 her name.

4 Q. Did you have any other meetings with Port of
5 Seattle staff since your last deposition?

6 A. I have met twice with Robin Kordik in her
7 role as kind of the project manager for implementation
8 of the 401 Certification to discuss and review a draft
9 matrix that the Port is developing with time lines for
10 tracking the project.

11 Q. Have you seen a draft of that matrix?

12 A. I have.

13 Q. Have you produced that in response to one of
14 ACC's Public Disclosure Act requests?

15 A. I have not, because they have not provided it
16 to me. It was simply shown to me at a meeting and then
17 discussed and then taken back, so I have not
18 received --

19 Q. You don't have a copy in your possession?

20 A. -- a hard copy that I could give to you or
21 even an electronic copy, no.

22 Q. Who was at this meeting where the matrix with
23 the time line on the project was discussed?

24 A. Robin Kordik and myself.

25 Q. Anyone else?

1 A. No.

2 Q. Is this matrix for the entire -- what is this
3 matrix regarding?

4 A. The matrix takes the terms of the 401
5 Certification and we go through -- it goes through
6 section by section and identifies the deliverables or
7 the items that are due to Ecology, they have identified
8 the staff people working on them, the due dates, when
9 it was delivered, and I think there is a comment
10 section, something like that.

11 Q. Is there any other information on the matrix
12 other than what you've just described?

13 A. I can't recall.

14 Q. Have you had any other meetings with Port
15 staff other than the two you've just now told me about
16 since your last deposition?

17 A. I have met with the Port staff twice
18 concerning the revised Low Flow Analysis and Plan.

19 Q. When were those meetings?

20 A. One meeting was yesterday, the 19th, and then
21 the first meeting was a week ago last Tuesday, so I
22 guess that would have been the 12th of February.

23 Q. What was the purpose of these -- well, let's
24 take them one at a time. What was the purpose of the
25 meeting on February 12th?

1 A. The purpose of that meeting was to provide
2 Keith Smith at the Port with some preliminary findings
3 that Kelly Whiting has drawn regarding the plan.

4 Q. Who was at the meeting?

5 A. It was myself, Kelly Whiting and Keith Smith.

6 Q. Did Mr. Whiting provide a memo to you and
7 Keith Smith at this meeting regarding his preliminary
8 findings with respect to the revised Low Flow Plan.
9 (Discussion off the record.)

10 A. He provided a working draft for discussion
11 purposes only at the meeting.

12 Q. (BY MR. STOCK) And did you retain a copy of
13 that memo?

14 A. No. We returned the memo.

15 Q. To Mr. Whiting?

16 A. To Mr. Whiting.

17 Q. He showed this memo to Keith Smith; is that
18 right?

19 A. He did.

20 Q. What were Mr. Whiting's preliminary findings
21 that were discussed at this meeting on February 12th?

22 A. There were a number of items that were
23 discussed of a fairly technical nature, and I could
24 lump them into one area would be concerns regarding
25 changes or adjustments to the 1994 preproject model

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1 that the Port had made. There were changes in land use
 2 assumptions; there were some discrepancies, minor
 3 discrepancies, in the acreages between the 1994 model
 4 that Kelly had previously reviewed and the model that
 5 appeared in the December 2001 revised version; there
 6 were general concerns about the design of some of the
 7 proposed facilities and how the design might lead to
 8 some potential problems with water quality; there were
 9 concerns that there were mistakes made in the Miller
 10 Creek modeling in terms of the portions of groundwater
 11 from Perland 80, something like that, P-E-R-L-A-N-D 80.
 12 That's an HSPF category for tracking water.

13 Want me to keep going?

14 Q. I do.

15 A. There were concerns in Walker Creek with the
 16 amount of time being proposed to fill the low flow
 17 vault.

18 Q. Any particular low flow vault or all of them?

19 A. The vault that would be used to offset
 20 impacts in Walker Creek. There is only one vault
 21 there, I believe.

22 Q. What other concerns did Mr. Whiting express
 23 to Mr. Smith at this meeting regarding the revised Low
 24 Flow Plan?

25 A. We looked at some charts and some hydrographs

1 bottom layer of water coming out was much more rolling
 2 or level. So we discussed that as an area, that it
 3 just didn't seem to make intuitive sense.

4 Q. Any other hydrographs that appeared erroneous
 5 to Mr. Whiting and that were discussed at that meeting?

6 A. Not that I recall.

7 Q. You said that Mr. Whiting expressed a concern
 8 about the design of proposed facilities and how the
 9 designs might lead to problems with water quality.
 10 What proposed facilities were discussed at this meeting
 11 in terms of problems with the design?

12 A. Well, those would be the facilities that are
 13 proposed in the low flow report and the facilities
 14 specifically identified to provide reserve low flow
 15 storage which they intend to place at the bottom of
 16 planned stormwater facilities or in tandem to planned
 17 stormwater facilities.

18 Q. And what was Mr. Whiting's concerns in that
 19 regard?

20 A. One concern was that the design of the inflow
 21 pipes to the low flow facility and the pipes for the
 22 stormwater detention facility might result in -- I'll
 23 have to back up a little to try to explain how these
 24 things work given that I'm not a structural engineer.
 25 The way I understand they are designed to work is that

1 that looked like they were erroneous, there were errors
 2 in them that didn't seem to make sense, so we
 3 discussed -- well, Kelly and Keith discussed what might
 4 have led to the results in the hydrograph that didn't
 5 appear to make sense to Kelly's trained eye.

6 Q. Are you saying there were inconsistencies
 7 between the charts and the hydrographs?

8 A. What I'm trying to say is that there were
 9 some hydrographs that didn't make sense.

10 Q. Do you recall which hydrographs didn't make
 11 sense?

12 A. I recall specifically one hydrograph that
 13 shows there was work done by Pony Ellingson that shows
 14 the water coming through the embankment, and it was for
 15 the slice model -- slice area 1, which is the thickest
 16 portion of the embankment at the pinch point of Miller
 17 Creek, and it appeared to be very flashy.

18 So what that means is that -- the hydrograph
 19 shows precipitation raining on the embankment and then
 20 water coming -- predicted to come out of the base of
 21 the embankment. And there seemed to be -- you know,
 22 rain is very spiky, you know, it rains and then there
 23 is no rain, and so the corresponding hydrograph for
 24 water coming out the bottom was equally flashy, where
 25 in other areas of the embankment the curve for the

1 water will come in during normal rain flow events, it
 2 will go into the low flow portion of the vault, which
 3 is -- has now been redesigned in response to our
 4 comments and concerns conditions in the September 21st
 5 401 to provide, it's kind of a baffled system where the
 6 water goes in and then it courses back and forth, it's
 7 kind of a baffling system that allows for settling of
 8 sediments and then the water moves into the detention
 9 part of the facility for stormwater and so there is
 10 always water moving in and out.

11 But in a storm event there may be water
 12 that -- okay, yeah, would flush -- would move that
 13 water through the low flow vault more rapidly, and then
 14 that outflow for the detention vault discharges
 15 directly to stream. The plan to release water for the
 16 low flow, there is a separate outfall for that. So
 17 there is two outfalls, one for the detention and one
 18 for the low flow. And it's the low flow outfall where
 19 they would be doing their proposed monitoring for
 20 dissolved oxygen, sediments, whatever the criteria that
 21 they propose to monitor to ensure -- temperature is one
 22 -- for water quality compliance.

23 So during storm events there might be the
 24 potential that that water could flush through, the
 25 stormwater would flush through and go through the

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5 (Pages 205 to 208)

1 stormwater outfall, thereby releasing water that had
2 been stored for some length of time in the low flow
3 facility that might have a problem. No to say that it
4 will, but that it might because it might have been
5 sitting there longer. So that was one thing that we
6 discussed in terms of the design.

7 The other area of concern was that by virtue
8 of sitting in this vault for the low flow portion of
9 the vault in this baffled system which has a lot of
10 area of exposed concrete, that that might, although not
11 necessarily, raise the pH of the water in that portion
12 of the vault. So we have discussed various ways that
13 pH could be prevented, either lining or painting the
14 vault or various treatment options for treating pH as
15 it comes out of the vault, either through adding acid
16 in some kind of a treatment facility, or I guess there
17 is another process called CO2 sparging that will adjust
18 the pH.

19 Q. Any other design aspects that were discussed
20 at this February 12 meeting where Mr. Whiting expressed
21 a concern?

22 A. I don't believe so.

23 Q. Were any conclusions reached at this February
24 12th meeting?

25 A. No.

1 Q. What was the upshot of the February 12
2 meeting?

3 A. The February 12th meeting lead to the meeting
4 that we had yesterday with the Port.

5 Q. Who was at this February 19 meeting?

6 A. Keith Smith, Paul Fendt, Joe Brascher, Pony
7 Ellingson, Felix Kristanovich, Nick Stackelberg, Kelly
8 Whiting, Ed Abbasi, myself, and Ray Hellwig was there
9 for a portion of it, and John Drabek was there for a
10 portion of it.

11 Q. Geez, quite a crowd.

12 A. It was all of the technical experts from the
13 Port that were involved in the low flow.

14 Q. There are a couple of names that I haven't
15 heard of before. The first one was Felix --

16 A. Kristanovich. I think he must be Russian.

17 Q. Who is Mr. Kristanovich?

18 A. He is a modeler with Foster Wheeler, an
19 engineering consulting firm, and he has been doing the
20 HSPF modeling work for Des Moines Creek.

21 Q. Who is Nick --

22 A. Stackelberg.

23 Q. -- Stackelberg?

24 A. He is employed by Parametrix, and he has been
25 doing a quality check and review on the land use cover

1 assumptions for the modeling in all three basins, I
2 believe, so using GIS data and other mapping
3 technologies they are verifying the acreages of the
4 basins.

5 Q. Why was Ray Hellwig at this meeting?

6 A. He was at the meeting simply to observe and
7 listen to some of the technical discussions that were
8 occurring.

9 Q. Why?

10 A. Because he wanted to, I believe.

11 Q. Well, did he have anything to say?

12 A. He welcomed people to the meeting and just
13 expressed his appreciation for everyone's willingness
14 to come together.

15 Q. Did he say anything else at the meeting?

16 A. No.

17 Q. How long did he stay?

18 A. Oh, about an hour, hour and 15 minutes,
19 something.

20 Q. How long did the meeting last?

21 A. We started at around 9:00 and left about
22 quarter of one.

23 Q. What was the purpose of this meeting on
24 February 19th?

25 A. The purpose of the meeting was to provide the

1 Port and their consultants the opportunity to meet with
2 Kelly and hear his concerns directly from him rather
3 than mediated through Keith Smith's interpretation of
4 what his concerns were, and for there to be a
5 discussion of the technical issues and the opportunity
6 for the Port to provide Kelly with additional
7 information or clarification that might not have been
8 readily available or necessarily understandable from
9 what was provided to us in the written document.

10 Q. Was there an agenda for the meeting prepared?

11 A. Yes, there was.

12 Q. Who prepared the agenda?

13 A. Keith Smith did.

14 Q. And you were given a copy of that agenda?

15 A. Right.

16 Q. And you have a copy?

17 A. Right, yes.

18 Q. Was anything else prepared for the meeting in
19 terms of documentation or memos or reports?

20 A. Paul Fendt provided us with a map that
21 showed -- shows changes in the groundwater and surface
22 water basins between the 1994 predeveloped conditions
23 and the 2006 postdeveloped conditions that we had not
24 seen before and then there was a chart that accompanied
25 that document.

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6 (Pages 209 to 212)

1 Q. What was the chart?
 2 A. It was a table summarizing acreage changes, I
 3 believe. I didn't look at it, actually.
 4 Q. Did you keep a copy?
 5 A. Yes.
 6 Q. What other documentation was prepared?
 7 A. That was it.
 8 Q. Did Kelly Whiting prepare a memo from the
 9 meeting?
 10 A. He was working from his own draft working
 11 notes.
 12 Q. Did he hand out any memo or notes?
 13 A. No.
 14 Q. What was discussed at the February 19
 15 meeting?
 16 A. The items of discussion were the items that
 17 we had outlined on February 12th, so they included for
 18 all three basins, that being Miller, Walker and Des
 19 Moines Creek, reviewing the land cover issues,
 20 addressing calibration issues, talking about some of
 21 the areas where there might have been errors introduced
 22 into the modeling and how that was resolved or would be
 23 resolved. We talked about the design issues relevant
 24 to water quality.
 25 Q. What was discussed with respect to the errors

1 this factor of 24 in the way that the precipitation was
 2 handed off between the Slice and Hydrus models to the
 3 HSPF model.
 4 At that meeting we had discussed a few
 5 changes in Des Moines Creek to some of the groundwater
 6 and surface water basins to correct errors at that time
 7 that misrouted water to various -- there was some
 8 misrouting, we discussed that. What we received in
 9 December was a model that made a lot more changes, and
 10 we were able, through discussing this issue yesterday
 11 with Nick Stackelberg and Paul Fendt, to understand the
 12 basis for those changes, and they provided us with the
 13 map that shows on the ground where the surface water
 14 and groundwater changes were occurring and were able
 15 to, I believe, satisfy Kelly as to the basis for those
 16 changes.
 17 What he requested and Ecology concurred with
 18 was that the Port provide a validation report of the
 19 modeling that is some tool to verify that the -- it
 20 would be a tool to verify the assumptions of the
 21 modeling.
 22 Q. So this validation report has become a
 23 deliverable?
 24 A. Yes.
 25 Q. And when is this validation report due?

1 introduced into the modeling?
 2 A. Port staff and their consultants agreed with,
 3 oh, a good portion of the comments that Kelly had
 4 raised and had gone in and looked at them and agreed
 5 that there were errors and they have already taken
 6 steps to correct those errors. So it was explained how
 7 that occurred, and the steps that they were taking to
 8 correct those errors was also discussed and explained.
 9 Q. What errors did Mr. Whiting identify in the
 10 modeling?
 11 A. Well, specifically to Miller Creek there was
 12 a problem with double counting of precipitation. That
 13 might have been related to the Perland 80 problem, but
 14 I am not a modeler and I don't understand that fully.
 15 Q. You too, huh.
 16 A. It's quite a science.
 17 Q. What other errors did Mr. Whiting express a
 18 concern about with respect to the modeling?
 19 A. I wouldn't classify this particular issue as
 20 an error, but we discussed the modeling in Miller Creek
 21 and the fact that they had -- the Port had made changes
 22 that went beyond the changes that Ecology had expected
 23 in the meeting that we held with the Port on October
 24 30th of 2001, which is the meeting where the Port
 25 identified an error in accounting for precipitation,

1 A. We didn't establish an immediate time line at
 2 that meeting for submittal. The Port indicated that
 3 they would begin working on it immediately. We are --
 4 Kelly was able at this meeting to have several of his
 5 questions regarding the modeling and the changes
 6 that -- the things that he had questions about were
 7 able to be resolved, and we need for him to put his
 8 final conclusions into writing.
 9 Q. Is there a date by which he is to put his
 10 final conclusions in writing?
 11 A. I had hoped to be able to establish that
 12 yesterday, but when he came into the meeting in the
 13 morning he advised me that a very close personal friend
 14 of his had been killed over the weekend and that this
 15 week he would be involved in funeral preparations, so I
 16 am not sure when I'm going to be able to get that
 17 letter from him.
 18 Q. How long do you anticipate Mr. Whiting will
 19 take to complete his final conclusions and put them in
 20 writing?
 21 A. I don't know. I had the feeling yesterday
 22 that the only thing that was on his mind was this
 23 personal loss of his, and I will try calling him
 24 Thursday or Friday to discuss that with him.
 25 Q. What was discussed at this February 19

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7 (Pages 213 to 216)

1 meeting regarding calibration issues?
2 A. I'm not sure if this is -- well, it's
3 somewhat related to calibration. We discussed in the
4 Miller Creek basin where the point of compliance should
5 be.

6 Q. And what was discussed in that regard?

7 A. We discussed moving the point of compliance
8 to a lower point in the basin to capture more
9 appropriately several drainage areas that had not been
10 represented. We also discussed that moving this point
11 of compliance would go some distance in meeting the
12 concerns raised by Northwest Hydraulics about the point
13 of compliance in the Miller Creek basin.

14 Q. Where is the point of compliance going to be
15 moved to?

16 A. I'm not exactly sure. I believe it is
17 somewhere just south of 509. The modelers understood
18 the map that they were pointing at and we'll have that
19 information back to us from the Port.

20 Q. When?

21 A. When we agree to a time line for submittal of
22 that information.

23 Q. Well, what was said at the meeting in that
24 regard?

25 A. As I've already explained, we hope to get the

1 letter from Kelly. There is some uncertainty about
2 when that letter is going to come, and that it will
3 be -- it's our expectation that the Port intends to
4 turn around their comments or their response or
5 revision in a very short order of time, maybe a week,
6 maybe less, to the comments. They are already
7 underway.

8 They have already begun some of the modeling
9 work in response to the verbal things that we have
10 discussed, so they are already running -- they have
11 already rerun from the models from Miller Creek
12 correcting the changes and concerns that Kelly had
13 addressed. And their preliminary run, which we have
14 not verified through receipt of the models, is that
15 they are still showing that the water from the
16 embankment will offset any impacts to low flow.

17 Q. In Miller Creek?

18 A. In Miller Creek.

19 With regard to these hydrographs concerning
20 the Slice 1 for the thickest portion of the embankment,
21 Pony Ellingson was able to explain why it was flashy.
22 That is based on the way that he had done his model
23 using cells for this portion of the area that he was
24 looking at, and the first three cells which are closest
25 to the MSE wall are very porous, and so the

1 precipitation that falls is going through that very
2 quickly, so that explains why those hydrographs are
3 showing a corresponding flashiness to the
4 precipitation, and that satisfied Kelly in terms of
5 that question that he had.

6 I believe that what Kelly said regarding the
7 calibration for Des Moines and Walker was that the
8 calibration looked reasonable. The calibration for Des
9 Moines Creek we discussed with Joe Brascher, and
10 although there is, quote, not a very good match, end of
11 quote --

12 Q. Who said that?

13 A. According to Kelly.

14 Q. Kelly said that?

15 A. Kelly said that, and Joe Brascher echoed that
16 -- the discrepancies would be very likely due to the
17 inadequacy of the gauging system in place by King
18 County to really accurately measure low flow changes.
19 That gauge system is in place to measure changes in
20 peak flow, not low flow, and so some of the readings
21 from the actual gauge data, according to Mr. Brascher,
22 simply don't make any sense. They have got to be
23 errors, in his opinion, in, you know, the gauge was not
24 functioning or it simply wasn't able to do what it was
25 supposed to do.

1 He said there is a discrepancy between the
2 upper gauges and the kind of data that they were
3 getting out of the lower gauges at the mouth, and you
4 would have to ask him about what all that means, but
5 Kelly seemed to agree that that would make a logical
6 reason for why there would be not a good match between
7 the gauge data and the predicted outcome of the model
8 for calibration purposes, but both Kelly and Joe
9 Brascher were of the opinion that the basic calibration
10 for all three basins is very solid.

11 Q. What was said at the February 19th meeting
12 with respect to reviewing land cover issues?

13 A. That was discussed in all three basins using
14 numbers that Kelly had pulled from the revised December
15 2001 low flow report and comparing that to numbers that
16 Paul Fendt had generated using this map that I've
17 discussed, and the chart, and comparing those numbers.
18 And after we went through that process, Kelly seemed to
19 be satisfied that those numbers in the December plan
20 seemed reasonable, I believe.

21 Q. You believe what, that Mr. Whiting --

22 A. Right, I believe he was satisfied. But I
23 didn't get a chance to talk with him after the meeting.
24 You'll have to ask him that. But he seemed to --
25 didn't have any more questions after we went through

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1 that.

2 Q. Other than the agenda and the map and chart

3 that Mr. Fendt provided, was there any other

4 documentation reviewed at this meeting on February

5 19th?

6 A. Well, what both Kelly referred to and

7 Mr. Fendt and the other technical people was the

8 December 2001 report and the appendixes that went with

9 that.

10 Q. Any other documentation?

11 A. No.

12 Q. Was any other documentation provided at this

13 February 19 meeting other than the agenda and the map

14 and the chart that Mr. Fendt provided?

15 A. No.

16 Q. Why was Mr. Abbasi at the meeting?

17 A. Mr. Abbasi attended the meeting because I had

18 requested him to as the permit manager for the NPDES

19 stormwater permit. He was very interested in

20 knowing -- well, I can't say what he was interested in

21 knowing because I can't read his mind, but he will be

22 responsible for the revised NPDES permit that will be

23 issued this summer that I believe does include the new

24 and proposed stormwater facilities for the third runway

25 and that would be incorporated into the industrial

1 stormwater permit. He was also there to provide

2 technical support to me when we discussed some of the

3 design issues regarding those stormwater facilities

4 because he is an engineer.

5 Q. Was there any discussion at yesterday's

6 meeting regarding the March hearing before the PCHB?

7 A. Not particularly, no.

8 Q. In general?

9 A. Well, only in general.

10 Q. In what way?

11 A. I think just everybody expressed their wish

12 that we could have this revised work from the Port

13 completed before the hearing.

14 Q. Why?

15 A. So that we could reference it if we need to.

16 Q. Why do you think there is going to be a need

17 to reference it at the March hearing?

18 A. Well, I think that's a legal issue and it's a

19 speculative issue. My personal belief is that we

20 issued a valid 401 with conditions and the Port is

21 complying with those conditions. They are submitting

22 the reports required by that 401 and Ecology is in the

23 process of reviewing those reports.

24 Q. Does the validation report that the Port is

25 now to provide, is that report necessary for Ecology to

1 have reasonable assurance?

2 A. I would say not, because what we approved in

3 August and September we are still looking at impacts

4 that are within that range of total impact, and we are

5 merely working now and fine-tuning some very fine

6 technical details, but the overall modeling work that

7 the Port has done continues to be consistent and is

8 supporting that earlier work.

9 Q. So let's see if I understand you correctly.

10 You're saying, Ms. Kenny, that -- well, first of all,

11 you made a recommendation of reasonable assurance --

12 A. That's correct.

13 Q. -- on August 10, 2001, correct?

14 A. (Witness nods head.)

15 Q. Is that correct?

16 A. That's correct.

17 Q. And on that basis a 401 Certification was

18 issued?

19 A. That's correct.

20 Q. You're now telling the Port that the Port has

21 to provide a validation report for the revised Low Flow

22 Plan that was submitted to the Department of Ecology in

23 December of 2001; is that correct?

24 A. That's correct, if I understood exactly what

25 was meant by the term validation report.

1 Q. Well, that's a term you used. What did you

2 mean by that?

3 A. That's a term that Kelly used, and I believe

4 I know what he expects but I'm not an engineer. That's

5 one of those issues I will be working out with Kelly

6 when I get to talk to him again about, okay, what

7 exactly is required in this report, because that's my

8 job is to put the parameters on what we're requiring

9 from the Port.

10 Q. Sure. And I just want your testimony to be

11 clear.

12 Your testimony is that you do not need this

13 validation report for the December 2001 revised Low

14 Flow Plan in order to have reasonable assurance for the

15 401 Certification issued to the Port; is that right?

16 A. No.

17 Q. So you do need this validation report to have

18 reasonable assurance; is that your testimony?

19 A. We need the validation report to give us a

20 final level of comfort over and above the level of

21 comfort that we've already reached that the modeling

22 approach and the impact numbers that the Port provided

23 us in August as supplemented by -- as required by the

24 401 Certification with the additional information that

25 we requested --

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1 THE WITNESS: Would you read that back? This
 2 is getting too complex here.
 3 Q. (BY MR. STOCK) Why are you avoiding the term
 4 reasonable assurance in your answer?
 5 A. I'm not avoiding the term. It's simply a
 6 term that I believe that your clients have a different
 7 opinion as to the meaning of reasonable assurance.
 8 Reasonable assurance is not absolute certainty.
 9 Reasonable assurance stems from our understanding of a
 10 project and the impacts of the project based on
 11 scientific analysis that the project is not likely to
 12 adversely impact water quality.
 13 Now, there are -- so that is a big picture,
 14 but there may be areas of some uncertainty or some
 15 areas that need further clarification and that is why a
 16 401 Certification is drafted or written the way it is,
 17 to require supplemental submittal of information. We
 18 have received nothing to date that shatters that
 19 overall confidence that the modeling performed by the
 20 Port and the impact numbers that they have provided
 21 with us are reasonable.
 22 Q. It's a simple question, Ms. Kenny. Do you
 23 need the validation report that you are now requiring
 24 the Port to submit for the December 2001 revised Low
 25 Flow Plan to have reasonable assurance with respect to

1 the 401 Certification issued to the Port of Seattle,
 2 yes or no?
 3 A. Yes.
 4 Q. With respect to the December 2001 revised Low
 5 Flow Plan, is there any other deliverable, other than
 6 this validation report, that Ecology is now requiring
 7 the Port to provide?
 8 A. We will be requiring the Port to submit to us
 9 revisions or corrections to that December report that
 10 correct the errors in that report.
 11 Q. And those revisions will be in response to
 12 Mr. Whiting's final conclusions as he sets out in this
 13 memorandum that he's going to provide to you; is that
 14 right?
 15 A. What we require the Port to do will be based
 16 on Mr. Whiting's letter. It will also be based on our
 17 own technical analysis of the report, the designs, and
 18 the water quality issues surrounding the project.
 19 Q. Well, other than what Mr. Whiting has done to
 20 review that December 2001 Low Flow Plan, has the
 21 Department of Ecology conducted any review independent
 22 of what Mr. Whiting has done?
 23 A. I have Mr. Garland, Dave Garland, reviewing
 24 the low flow portion -- I'm sorry, the modeling for the
 25 embankment, I have Mr. Abbasi reviewing the

1 technical -- I'm sorry, the design details for the low
 2 flow facilities. The information that Kelly gives to
 3 us is coming in the form of recommendations, and those
 4 recommendations will be utilized by Mr. Abbasi and
 5 Mr. Garland to make recommendations to me that I will
 6 incorporate in a final letter to the Port.
 7 Q. And just so I've got this, you're going to
 8 take what Mr. Whiting recommends to you and what
 9 Mr. Abbasi recommends to you and what Mr. Garland
 10 recommends to you, combine it all in one letter and
 11 send that letter to the Port saying that these are the
 12 revisions that you need to make to the December 2001
 13 Low Flow Plan; is that correct?
 14 A. That is my intent.
 15 Q. And when do you expect to send that letter to
 16 the Port?
 17 A. As soon as I can get the letter from Kelly,
 18 which as I explained, is uncertain, and then I can get
 19 the feedback from Mr. Abbasi and Mr. Garland.
 20 Q. What's your best estimate as to when you're
 21 going to send that letter?
 22 A. Two weeks, maybe, if I'm lucky.
 23 Q. Well, that puts it awfully close to the March
 24 18th hearing date, doesn't it?
 25 A. It will just happen when it happens.

1 Q. And then Ecology expects the Port to revise
 2 the December 2001 Low Flow Plan as required by your
 3 letter to the Port; is that right?
 4 A. That would be correct.
 5 Q. And what is Department of Ecology expecting
 6 from the Port? Is it going to be a report in response
 7 to the letter? What should I call it so that you and I
 8 can communicate here?
 9 A. Their response. It will be a response to our
 10 letter and it may -- I need to give it some thought to
 11 figure out what the best format would be.
 12 Q. It will be yet another revision to the Port's
 13 Low Flow Plan, will it not?
 14 A. It will be corrections to their revised
 15 December 2001 Low Flow Plan.
 16 Q. And my question is this: Do you need those
 17 corrections to the revised December 2001 Low Flow Plan
 18 in order to have reasonable assurance for purposes of
 19 the 401 Certification that has been issued to the Port
 20 of Seattle --
 21 A. Yes.
 22 Q. -- yes or no? And your answer is yes?
 23 A. Yes.
 24 Q. All right.
 25 MR. STOCK: Why don't we take a short break.

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10 (Pages 225 to 228)

1 (Recess taken.)
 2 MR. STOCK: Let's go back on the record.
 3 Q. (BY MR. STOCK) Let me hand you a copy of the
 4 September 21, 2001 401 Certification, which is
 5 Exhibit 1, and have you turn to Page 6 of the
 6 certification. The first full paragraph in the 401
 7 Certification states, No document, report or plan
 8 required by this order shall be deemed approved until
 9 the Port receives written verification of approval from
 10 Ecology. Do you see that?
 11 A. Yes.
 12 Q. Did you write that?
 13 A. Yes.
 14 Q. With respect to this validation report of the
 15 modeling for the revised December 2001 Low Flow Plan,
 16 is that sentence applicable?
 17 A. Yes.
 18 Q. With respect to the corrections to the
 19 revisions to the December 2001 Low Flow Plan, does the
 20 401 Certification require Department of Ecology to
 21 approve of those corrections in writing per this
 22 provision of the 401 Certification?
 23 A. Under this September 21st certification, we
 24 required the Port to submit a revised Low Flow Plan
 25 within 45 days of submittal.

1 Q. And they didn't do that, did they?
 2 A. Yes, they did.
 3 Q. It wasn't within 45 days, was it?
 4 A. Well, they requested an extension, which they
 5 are allowed to do under C(4).
 6 Q. So in any event, they submitted it in
 7 December?
 8 A. They did submit it. We have not yet approved
 9 that document.
 10 Q. Right. And my question is, pursuant to this
 11 provision of the 401 Certification on Page 6, doesn't
 12 the Department of Ecology have to provide written
 13 verification of approval for the December 2001 revised
 14 Low Flow Plan?
 15 A. Yes.
 16 Q. What is the status of the revised Natural
 17 Resources Mitigation Plan that was submitted to the
 18 Department of Ecology in November?
 19 A. That is still under review.
 20 Q. Who is doing the review?
 21 A. Katie Walter.
 22 Q. And what is the status of her review of the
 23 revised NRMP?
 24 A. I haven't spoken with her about that
 25 recently.

1 Q. When was the last time you spoke to her?
 2 A. Probably a month ago.
 3 Q. So Ms. Walter on behalf of Department of
 4 Ecology is still in the process of reviewing the
 5 revised NRMP, correct?
 6 A. I believe that's correct.
 7 Q. But other than that, you don't know what the
 8 status of her review is?
 9 A. Not today.
 10 Q. When was the last time you spoke with her, a
 11 month and a half ago?
 12 A. A month.
 13 Q. And what was the status of her review at that
 14 point?
 15 A. I believe she said she was working her way
 16 through that.
 17 Q. Do you expect to receive written comments
 18 from her with respect to the revised NRMP?
 19 A. Eventually.
 20 Q. And what will you do with those written
 21 comments?
 22 A. First I will read them, and -- well, probably
 23 before I read them we will discuss whether there are
 24 any issues or concerns that we need to go back to the
 25 Port and request clarification on.

1 Q. And then what will you do?
 2 A. Then we'll transmit those concerns back to
 3 the Port or a letter of written approval if that's the
 4 conclusion that we draw based on her review.
 5 Q. And you just anticipated my next question,
 6 and that is, with respect to this revised Natural
 7 Resources Mitigation Plan that the Port submitted in
 8 November 2001, pursuant to the provision of the 401
 9 Certification on Page 6, does Ecology have to provide
 10 written verification of approval of that revised NRMP?
 11 A. Yes.
 12 Q. And Ecology hasn't done that yet; is that
 13 right?
 14 A. No, we have not yet provided written approval
 15 of that document.
 16 Q. And that's because Katie Walter's review is
 17 not complete?
 18 A. That is correct.
 19 Q. Is the Department of Ecology performing any
 20 other review of the revised NRMP that you will rely
 21 upon in deciding whether to write a letter of approval
 22 of the revised NRMP or write a letter asking the Port
 23 for further clarification?
 24 A. I know that Erik Stockdale has been spending
 25 a lot of time reviewing the NRMP in preparation for the

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11 (Pages 229 to 232)

1 hearing.

2 Q. Well, you mean the revised NRMP?

3 A. I'm not certain.

4 Q. Well, that's my question. Other than looking
5 to Katie Walter for review of the revised NRMP, is the
6 Department of Ecology conducting any other review of
7 the revised NRMP that you will rely upon to determine
8 whether to write a letter of approval to the Port or a
9 letter seeking further clarification?

10 A. No.

11 Q. So it's only Katie Walter that the Department
12 of Ecology is relying upon with respect to reviewing
13 the revised NRMP that was submitted in November 2001;
14 is that correct?

15 A. Katie Walter is the primary reviewer. She
16 will make her recommendations to Ecology.

17 Q. To who at Ecology?

18 A. To me and to Erik Stockdale. I'm the
19 contract manager for her contract, so she has been
20 submitting things to me, but then I would forward those
21 comments to Erik. And then he and I would discuss with
22 Katie any concerns or unresolved issues, and with
23 Erik's direction as the technical expert on wetlands we
24 would make a determination as to what we would require
25 or whether we can approve the NRMP as submitted.

1 validation report for the modeling for the revised Low
2 Flow Plan?

3 A. With regards to the Natural Resource
4 Mitigation Plan we had a greater degree of completeness
5 in the information provided to us by the Port.

6 Q. How can you say that, Ms. Kenny, given the
7 Attachment B to the September 21 401 Certification?

8 A. Because --

9 Q. Isn't Attachment B four pages of revisions to
10 the NRMP?

11 A. As I explained in my deposition on December
12 20th, these sheet changes, plan sheet changes, required
13 in Attachment B were minor, nonsubstantive corrections
14 to their plan sheets that we had already discussed and
15 agreed to with the Port. The purpose of listing them
16 here is so that when we receive the revised NRMP we can
17 verify that those changes were made.

18 Q. So until you received the revisions and
19 verify that they have been made, you don't know that
20 they have been made, correct?

21 A. That's correct.

22 Q. And until you know that they have been made,
23 as you said at your December 20 deposition, you don't
24 have reasonable assurance; isn't that right?

25 A. I don't have the five percent of the 95

1 Q. Have you had any discussions with Erik
2 Stockdale about the revised NRMP?

3 A. No.

4 Q. I gather you anticipate having discussions
5 with Mr. Stockdale after you receive input from Katie
6 Walter?

7 A. Yes.

8 Q. Why does the Department of Ecology require
9 that the revised Natural Resources Mitigation Plan is
10 not approved until the Port receives written
11 verification of approval of that revised NRMP from
12 Ecology?

13 A. That is an administrative mechanism to
14 guaranty that there is a document in writing providing
15 that approval for every deliverable required under the
16 401, so to prevent any misunderstanding on the Port's
17 part or our part that we have given verbal approval
18 when in fact that did not happen.

19 Q. And I take it that Department of Ecology
20 needs an approved revised Natural Resources Mitigation
21 Plan in order to have reasonable assurance with respect
22 to the 401 Certification issued to the Port; is that
23 right?

24 A. No.

25 Q. Well, how is that different from the

1 percent that I need to get to a hundred percent assured
2 that these changes have been made.

3 Q. Why did you use 95 percent?

4 A. I'm picking a number out of the air. I feel
5 very confident that the Port will make these changes
6 and they are relatively minor changes. Our review by
7 Katie Walter was very very detailed. It's more
8 detailed than I have seen for any of the other wetland
9 mitigation projects that I have been involved with.
10 She was extremely detail-oriented, and these questions
11 about where something was located, a piece of woody
12 debris in a particular section along Miller Creek, were
13 all things that we went through in discussing with the
14 Port, and I believe that those changes will be made.
15 The bulk of the NRMP that they submitted December of
16 2000 was very solid.

17 Q. But you're not going to provide the Port of
18 Seattle with written approval of that revised NRMP
19 until Katie Walter has provided input to you; is that
20 right?

21 A. That's correct.

22 Q. And sitting here today you don't know when
23 Katie Walter is going to be providing that input to
24 you; is that right?

25 A. That's correct.

AR 028775

1 Q. Turn to the cover letter that was sent to the
2 Port of Seattle on September 21. The second paragraph
3 of the September 21 cover letter states that Ecology
4 concurs with the Port's certification that the project
5 is consistent with the approved Washington State
6 Coastal Zone Management Program; is that correct?

7 A. That's correct.

8 Q. What is your understanding of the Port's
9 certification that the project was consistent with the
10 Coastal Zone Management Program?

11 A. Could you be more specific?

12 Q. Well, let me back up and lay a foundation.
13 Who at the Department of Ecology was responsible for
14 concurring with the Port's certification that the
15 project was consistent with the Washington State
16 Coastal Zone Management Program?

17 A. I reviewed that issue and made a
18 recommendation to Gordon White, the program manager for
19 the Shorelands and Environmental Assistance Program.

20 Q. And when you reviewed the Port's
21 certification of compliance with the Coastal Zone
22 Management Program, what did you understand to be the
23 Port's obligations in that regard?

24 A. Procedurally the Port is required to submit a
25 statement to Ecology of consistency with the state's

1 submit?

2 A. One of the enforceable policies under CZM --
3 Coastal Zone Management Act, we call it shorthand CZM
4 -- is compliance with the state's Environmental Policy
5 Act. And we already had on file the Port's
6 documentation for SEPA, so we considered SEPA to be
7 complete. Another enforceable policy is the Shoreline
8 Management Act, and in the case of the airport site no
9 Shoreline Management Act permit is required because
10 none of those water bodies are within jurisdiction of
11 the state.

12 At the Auburn site for the mitigation a
13 shoreline permit is required because of its proximity
14 to the Green River. And in that case the Port received
15 an exemption from the City of Auburn to construct that
16 mitigation site and I have a copy of that letter on
17 file. We also require compliance with the state's
18 water quality laws and we issued an NPDES general
19 stormwater permit for the Auburn site, and the issuance
20 of the 401 for the airport site construction activities
21 was evidence of compliance with state water quality
22 law.

23 Q. What about air quality? Isn't there an
24 obligation under Washington's Coastal Zone Management
25 Program to comply with the Clean Air Act?

1 Coastal Zone Management Program, and it comes in the
2 format of a form that they check off various elements
3 that are applicable to the state's Coastal Zone
4 Program. Ecology then reviews that form and any
5 supporting documentation submitted with that form and
6 makes a determination that it can either concur with
7 that statement --

8 Q. Or deny it?

9 A. Well, it's -- the technical term isn't
10 denied. It's like kind of a nonconcurrence.

11 Object, that's the word. We object to the
12 concurrence consistency statement. Oh, boy.

13 Q. A lot of Cs, huh?

14 A. Yeah.

15 Q. So I take it the Port submitted this form to
16 you; is that right?

17 A. They did.

18 Q. And you reviewed that form?

19 A. I did.

20 Q. And did the Port also submit supporting
21 documentation with the form that it submitted to you
22 where the Port certified that the project complied with
23 Washington State's Coastal Zone Management Program?

24 A. They did.

25 Q. What supporting documentation did the Port

1 A. Yes. The Port submitted documentation of a
2 permit that they have from Puget Sound Clean Air
3 Agency, and that's for emissions related to their
4 activities. And then I checked with Doug Brown, who is
5 the section manager of our regional Air Quality
6 Program, and discussed the situation and the scope of
7 the project, and he had advised me that sometime in the
8 past the Air Quality Program had looked at this project
9 and had made a determination that air quality would not
10 be adversely affected.

11 Q. Are there any other obligations under
12 Washington's Coastal Zone Management Act other than an
13 obligation to comply with the state's Environmental
14 Policy Act, Shoreline Management Act, water quality
15 laws and air quality laws, or another way to put it,
16 did you --

17 A. Oh, there are several other enforceable
18 policies, but they are not relevant to this project;
19 for example, they are not an EFSEC project related to
20 energy. There are several others which I'm not
21 recalling, but they are not applicable to this project.

22 Q. With respect to the Port's obligation to
23 comply with SEPA, you said that the Department of
24 Ecology already had on file the Port's documentation
25 for SEPA; is that right?

AR 028776

1 **A. That's correct.**
 2 Q. What are you referring to?
 3 **A. The Environmental Impact Statement, the**
 4 **supplemental EIS, I believe there was one, and an**
 5 **addendum.**
 6 Q. Is there any other documentation for the
 7 Port's obligation to comply with SEPA under the Coastal
 8 Zone Management Program that you relied upon?
 9 **A. No.**
 10 Q. When did you conduct this review to determine
 11 whether Department of Ecology was going to concur in
 12 the Port's certification that the project is consistent
 13 with CZMP?
 14 **A. It was conducted between December 27th, 2000,**
 15 **and for Coastal Zone Management consistency we have six**
 16 **months to do a review. We normally try to complete**
 17 **that review concurrent with our issuance of the 401.**
 18 **We knew by the end of June or mid June 2001 that we**
 19 **weren't going to meet the six-month deadline, so we**
 20 **checked the regulations and checked with the Corps and**
 21 **determined that under the federal provisions and the**
 22 **rules that the Corps was following we would be able to**
 23 **-- Ecology and the Port would be able to mutually agree**
 24 **to an extension of the Coastal Zone Management deadline**
 25 **and we agreed to mutually extend that deadline until**

1 **December -- I believe December 27th of 2001.**
 2 Q. Who at the Department of Ecology performed
 3 the review of the Port's documentation for compliance
 4 with SEPA?
 5 **A. That would have been me.**
 6 Q. When did do you that?
 7 **A. During this time frame.**
 8 Q. When?
 9 **A. I don't recall. Just verifying that those**
 10 **SEPA documents had been issued by the Port as lead**
 11 **agency for the project.**
 12 Q. Did you perform any review of the EIS, the
 13 supplemental EIS or the addendum other than to verify
 14 that the Department of Ecology had those documents?
 15 **A. No.**
 16 Q. So your conclusion of concurrence that the
 17 Port's certification that the project is consistent
 18 with SEPA was based only upon your verification that
 19 the Department of Ecology had the EIS, the supplemental
 20 EIS, and the addendum; is that correct?
 21 **A. That's correct.**
 22 Q. And the Department of Ecology didn't rely
 23 upon any other documentation to come to that
 24 Concurrence decision with respect to SEPA?
 25 **A. No.**

1 Q. Is that correct?
 2 THE WITNESS: Could you repeat the question?
 3 Q. (BY MR. STOCK) Let me reask it. The
 4 Department of Ecology didn't rely upon any other
 5 documentation other than the EIS, the supplemental EIS,
 6 and the addendum for its determination that the Port
 7 had complied with SEPA for purposes of concurrency
 8 under CZMP?
 9 **A. The answer is no, we did not rely on any of**
 10 **that additional -- any of that documentation other than**
 11 **the documents you just listed.**
 12 MR. STOCK: Off the record
 13 (Discussion off the record.)
 14 Q. (BY MR. STOCK) With respect to the Port's
 15 obligations under the CZMP to comply with the Clean Air
 16 Act and other applicable air quality laws, did you rely
 17 upon any documentation other than the document from the
 18 Puget Sound Clean Air Agency that the Port provided to
 19 you?
 20 **A. No.**
 21 Q. Did you perform any independent review of
 22 whether the Port's project would comply with clean air
 23 laws?
 24 **A. What I did was I spoke with Doug Brown, the**
 25 **air program manager for our Regional office, and he had**

1 **advised me that sometime prior to my involvement in the**
 2 **project that air quality issues at the airport relevant**
 3 **to the third runway had been looked at and that a**
 4 **determination had been made that there wasn't a problem**
 5 **with air quality.**
 6 Q. Did Doug Brown provide you with any
 7 documentation in that regard?
 8 **A. He may have sent an e-mail. I may have taken**
 9 **some notes, I don't recall at this point.**
 10 Q. But sitting here you can't recall anything
 11 other than a discussion with Doug Brown; is that right?
 12 **A. That's correct.**
 13 **(Deposition Exhibit Nos. 444-445 were marked**
 14 **for identification.)**
 15 Q. (BY MR. STOCK) Ms. Kenny, you've been handed
 16 Exhibit 444. Identify what Exhibit 444 is, please.
 17 **A. Exhibit 444 is an e-mail sent by me on March**
 18 **20th, 2001, to Elizabeth Leavitt. The subject is**
 19 **concerning CZM documentation.**
 20 Q. And what are you asking Ms. Leavitt to do in
 21 this e-mail?
 22 **A. I am gathering information for a letter that**
 23 **is required to be submitted three months into this CZM**
 24 **review process and I'm asking the Port to submit some**
 25 **additional documentation.**

AR 028777

1 Q. And is the shoreline exemption letter issued
2 by the City of Auburn what you were referring to
3 earlier with respect to the Auburn mitigation site in
4 terms of the Port requiring a shoreline management
5 permit?

6 A. Yes.

7 Q. And the certification issued by the Governor
8 on June 30, 1997, why were you asking for a copy of
9 that?

10 A. **I don't remember specifically. It must have
11 said something about air quality compliance.**

12 Q. And is the permit issued by SPCAA on
13 September 21, 1999, the permit from the Puget Sound
14 Clean Air Agency that you referred to earlier?

15 A. **You transposed those letters. It's PSCAA.
16 Yes, it is.**

17 Q. Thank you for the correction.

18 And looking at Exhibit 445, is that the
19 certification from the PSCAA that you relied upon to
20 concur with the Port that it had complied with its
21 clean air obligations under the Coastal Zone Management
22 Program?

23 A. **It was one piece of evidence that the Port
24 was in compliance with air quality regulations in this
25 state.**

1 monthly air emission records?

2 A. No.

3 Q. Did you have any discussion with Doug Brown
4 regarding monthly air emission records for Sea-Tac
5 Airport?

6 A. **No, not that I recall.
7 (Discussion off the record.)**

8 Q. (BY MR. STOCK) Do you have any knowledge
9 whether Doug Brown reviewed monthly air emission
10 records prior to your conversation with him?

11 A. **I have no knowledge.**

12 MR. STOCK: Why don't we go ahead and take
13 our lunch break.

14 (Deposition recessed at 12:02 p.m., to be
15 reconvened at 1:00 p.m.)
16
17
18
19
20
21
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25

1 Q. And the other piece of evidence was your
2 conversations with Doug Brown?

3 A. Yes.

4 Q. Did it concern you that you were relying upon
5 a September 1999 order from the Puget Sound Clean Air
6 Agency to concur that the Port was complying with its
7 clean air obligations when you issued the concurrency
8 on September 21, 2001?

9 A. No.

10 Q. Why not?

11 A. **I want to take a moment to review this
12 document.**

13 Q. Take all the time you need.

14 A. (Witness reviewing document.)

15 **My review of this document issued by Puget
16 Sound Clean Air Agency indicated that this was still an
17 active, valid permit that the Port was operating under
18 with ongoing monitoring and reporting requirements to
19 that agency.**

20 Q. Did you rely upon the March 21, 2001, letter
21 from Maggie Corbin at the Port to you to determine
22 whether the Port was in compliance with its air quality
23 obligations?

24 A. Yes.

25 Q. Did you make any independent review of

1 AFTERNOON SESSION

2 1:00 p.m.

3 --oOo--
4

5 CONTINUING EXAMINATION

6 BY MR. STOCK:

7 Q. With respect to the December 2001 revised Low
8 Flow Plan, what SEPA documentation did you review to
9 determine consistency with the Coastal Zone Management
10 Program?

11 A. **Your question doesn't make any sense to me,
12 and I could explain why if you want.**

13 Q. All right. Why don't you think that question
14 makes senses?

15 A. **Because the Coastal Zone Management
16 consistency determination was made on September 21st,
17 2001 with the documents that we had in place at that
18 time, so the document that we were reviewing was the
19 December -- well, let me back up. We don't really
20 review individual -- no, that's not right.**

21 **Okay. Well, for the 401, which was issued as
22 a 401 Certification and an administrative order under
23 RCW 90.48, when we issued that, that was our
24 determination that this project was in compliance with
25 state water quality laws and so that was issued**

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1 simultaneously with the Coastal Zone Management
2 consistency concurrent statement. And so for purposes
3 of the 401 we were relying on the December 2000 low
4 flow report and the revisions to that work or the
5 supplemental information to that work submitted in, oh,
6 the end of July of 2001, I think that's when that was.

7 Q. You're talking about Ecology's obligation
8 under the Coastal Zone Management Program to concur
9 with the Port's certification that the project will
10 comply with water quality standards when you refer to
11 the 401 Certification, are you not?

12 A. When we issue the consistency concurrent
13 statement, yes.

14 Q. And my question is for those parts of the
15 project that were submitted to Ecology after September
16 21, 2001, what SEPA documentation did you rely upon to
17 concur with any certification by the Port that those
18 parts of the project comply with SEPA?

19 MR. REAVIS: Object to the form of the
20 question.

21 A. Are you still asking that question with
22 regards to Coastal Zone consistency?

23 Q. (BY MR. STOCK) Yes.

24 A. My answer to that question is that, no, we
25 didn't rely on any subsequent documents because our

1 here?

2 A. No, because at the end of July we had asked
3 the Port to provide us with preliminary designs of
4 their low flow facilities, so we had that in hand prior
5 to making our decision. The designs that are in the
6 December 2001 revised low flow report are a refinement
7 of those designs.

8 Q. Well, the designs in the revised December
9 2001 Low Flow Plan are different from the designs in
10 the July Low Flow Plan, are they not?

11 A. They are not identical.

12 Q. They are different, aren't they?

13 A. They are different.

14 Q. And my question is with respect to the design
15 of the structures as they are set forth in the December
16 2001 revised Low Flow Plan. Isn't it true that Ecology
17 has not made any determination that those revised
18 designs are consistent with the Washington State
19 Coastal Zone Management Program?

20 THE WITNESS: Would you read that back again,
21 please.

22 (The reporter read back as requested.)

23 A. The only way I can answer that question is to
24 say that I don't believe that those facilities are
25 required to be reviewed by us.

1 decision on CZM was made on September 21st -- first
2 October 10th and then on September 21st, and it's a
3 one-time decision. It's not a -- I mean, they applied,
4 we issued our decision, there was no further work
5 necessary on Coastal Zone Management.

6 Q. I see what you're saying. So, for example,
7 with respect to the Port's revised December 2001 Low
8 Flow Analysis and the structures contained within that
9 analysis, the Department of Ecology has not made any
10 concurrency determination that those structures comply
11 with any obligation under SEPA?

12 MR. REAVIS: Excuse me. Can you read that
13 question back, please.

14 (The reporter read back as requested.)

15 Q. (BY MR. STOCK) Is that right?

16 A. I don't know that I can answer the question
17 the way you've phrased it.

18 Q. Is it true that Ecology has not made any
19 determination that the structures set forth in the
20 December 2001 revised Low Flow Plan are consistent with
21 the Washington State Coastal Zone Management Program?

22 A. I would say they are -- yes, they are
23 consistent with Washington's Coastal Zone Management
24 Program.

25 Q. Did you just make that determination sitting

1 Q. (BY MR. STOCK) But that's not an answer to
2 my question, Ms. Kenny. You need to answer my
3 question, and it's a simple question; it's a yes or no
4 question.

5 Isn't it true that Ecology has not made any
6 determination that the revised designs for the
7 structures set out in the December 2001 revised Low
8 Flow Plan are not consistent with the Washington State
9 Coastal Zone Management Program?

10 MR. REAVIS: Let me just object. And I think
11 that question was answered, and I object to the
12 question to the extent it requires the witness to
13 answer yes or no when she doesn't feel that that's an
14 appropriate choice.

15 MR. STOCK: Could you reread my question.

16 Q. (BY MR. STOCK) And then please answer my
17 question.

18 (The reporter read back as requested.)

19 A. Could you restate that as a positive
20 statement rather than a negative. I think I'm getting
21 hung up on too many negatives and whether they are
22 double negatives meaning a positive.

23 MR. STOCK: Could you mark that question so
24 we can come back to it.

25 Q. (BY MR. STOCK) All I want to know is has

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1 Ecology made any determination with respect to the
2 revised designs for the structures in the December 2001
3 revised Low Flow Plan that those structures are
4 consistent with the Washington State Coastal Zone
5 Management Program.

6 **A. No, we have not made any such determination.**

7 **Q.** And the same is true, isn't it, with respect
8 to the revised design for the structures contained in
9 the November Natural Resources Mitigation Plan, Ecology
10 has not made any determination whether those revised
11 designs are consistent with the Washington State
12 Coastal Zone Management Program?

13 **A. Yes, we have not made any determination that
14 they are consistent with the Coastal Zone Management
15 Program.**

16 **Q.** And so with respect to any structure where
17 the design has been revised since September 21, 2001,
18 when the Port issued the 401 Certification, Ecology
19 hasn't made any review of those revised structures to
20 determine compliance with SEPA?

21 **A. No.**

22 **Q.** What review has Ecology made in that regard
23 since September 21, 2001, to determine whether revised
24 structures since that date are compliant with SEPA?

25 **A. We haven't made any, but I don't believe it's**

1 **Q.** Has Ecology performed any review of any
2 additional structures proposed by the Port for the
3 project since it issued the 401 Certification?

4 **A. Yes.**

5 **Q.** What review has Ecology made?

6 **A. As I described this morning, we have Kelly
7 Whiting reviewing the revised Low Flow Plan and the
8 accompanying designs that came with that December 2001
9 Low Flow Plan.**

10 **Q.** So you agree that there are additional
11 structures proposed by the Port since the issuance of
12 the September 401 Certification?

13 **A. No.**

14 **Q.** Well, that was my question, and maybe it
15 wasn't clear.

16 My question is, has Ecology engaged in any
17 review of any new structures that the Port is proposing
18 to make a part of its project since issuance of the 401
19 Certification?

20 **MR. REAVIS:** Objection, lack of foundation.

21 **A. I don't believe that we are reviewing any new
22 structures. These are structures that were already
23 identified, at least in concept, in the earlier
24 versions of -- well, the versions that we had in hand
25 before we issued the decision in August and then**

1 **necessary for us to make that determination because
2 those facilities have not changed in a manner
3 substantive enough to invalidate any prior
4 determination that SEPA was appropriately complied
5 with.**

6 **Q.** So you're changing your answer to my previous
7 question?

8 **A. Your previous question was with regard to
9 Coastal Zone Management. This question, as I recall or
10 interpreted it, was with regard to SEPA.**

11 **(Pause in proceedings.)**

12 **Q.** (BY MR. STOCK) I am a little confused,
13 Ms. Kenny, with respect to your answers. What I'm
14 trying to figure out, and I understand that you may
15 think that no review is necessary, but what I'm trying
16 to figure out is whether Ecology has made any review to
17 determine whether the revised structures submitted by
18 the Port since Ecology issued the 401 Certification are
19 in compliance with SEPA.

20 **A. No.**

21 **Q.** Has Ecology required the Port to prepare any
22 SEPA documentation for any revisions made to the
23 structures under the revised Low Flow Plan since
24 Ecology issued the September 401 Certification?

25 **A. No.**

1 **reissued it on September 21.**

2 **Q.** (BY MR. STOCK) When you say that these
3 structures were identified in concept and that you
4 aren't reviewing any new structures, what do you mean
5 by that?

6 **A. For example, with the low flow facilities,
7 the Port has already identified where those facilities
8 will be located. They have identified that they will
9 be added to proposed stormwater vaults which we've
10 already reviewed and approved under the stormwater
11 plan, so we know their location, we know their number,
12 we know their general design and the purpose they were
13 to serve when we approved this project on September
14 21st. What the certification asked for was more
15 detail.**

16 **Q.** The size of the vaults have changed, haven't
17 they, in some cases?

18 **A. Of the low flow vaults?**

19 **Q. Yes.**

20 **A. The size has changed. We, however, have not
21 approved the December 2001 revised Low Flow Plan.**

22 **Q.** Let's move to another topic. Turn to page 10
23 of the September 21 401 Certification. Has the Port
24 submitted the conceptual plan with respect to the
25 mitigation for this 2.05 acres of wetlands referred to

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1 on Page 10?

2 **A. Yes, they have.**

3 **Q. And what is that conceptual plan called,**
4 **what's the document?**

5 **A. I don't recall the exact title, but it came**
6 **as a separate document, Wetland A17 Mitigation Plan. I**
7 **don't recall the exact title.**

8 **Q. What's the status of the review of that**
9 **conceptual plan for Wetland A17?**

10 **A. Well, we've actually received that plan**
11 **twice. We received it as a separate document and it**
12 **was incorporated into the revised Natural Resource**
13 **Mitigation Plan that we received late November of 2001,**
14 **so that revised NRMP is, as I explained this morning,**
15 **in the process of being reviewed.**

16 **Q. So the Department of Ecology has not provided**
17 **written approval yet of this conceptual mitigation plan**
18 **for the 2.05 acres identified on Page 10 of the**
19 **certification; is that correct?**

20 **A. That's correct.**

21 **Q. And do you agree that Ecology needs the**
22 **conceptual mitigation plan for the 2.05 acres to have**
23 **reasonable assurance?**

24 **A. Yes.**

25 **Q. Why is the 401 Certification requiring that**

1 **So there is a real time loss in that wetland's ability**
2 **to filter water, store water; it can't function as a**
3 **wetland when it's all torn up. So by requiring this**
4 **additional area be set aside we are attempting to**
5 **offset that temporary impact and provide those**
6 **additional, as it says, wetland water quality and**
7 **general habitat functions.**

8 **Q. Turn to Page 13 of the 401 Certification.**

9 **With respect to the Barrow Site 3 on the increased**
10 **buffer area -- I'm looking at Subparagraph F on Page 13**
11 **-- with respect to the increased buffer area for Barrow**
12 **Site 3, why was that the certificate amended to apply**
13 **the buffer only to property owned by the Port?**

14 **A. If you'll look at Attachment D of that**
15 **certification, our wetland scientist Katie Walter, in**
16 **developing the August 10th version of this map, had**
17 **drawn a buffer around what looks like Wetland B5, or**
18 **maybe it's 85, I can't quite read this.**

19 **Q. I suspect it's B5, given the language on F.**

20 **A. And to get the appropriate buffer, which I**
21 **believe was 25 feet, she went down into this corner of**
22 **this property down here (indicating). I don't know**
23 **what direction it is. The Port doesn't own that**
24 **property. And as I recall in our discussions with the**
25 **Port, that's -- I'm fuzzy on this -- it was approaching**

1 the additional mitigation be in-basin?

2 **A. That was in response to comments that we have**
3 **received from the ACC, from Amanda Azous, in writing,**
4 **and then there was also -- I took note of those**
5 **comments in person when we met with the ACC down in**
6 **Burien or wherever it was that we had that meeting and**
7 **listened to Amanda talk about the need for additional**
8 **in-basin mitigation.**

9 **Q. She will be pleased to hear that she had an**
10 **impact.**

11 **A. We have actually listened to some of the**
12 **comments. We've reviewed them all and we've accepted a**
13 **number of them.**

14 **Q. What does the term "temporal lift" mean on**
15 **Page 10 of the certification?**

16 **A. Let me, please, review this. (Witness**
17 **reviewing document.)**

18 **This language was provided to me by Erik**
19 **Stockdale, so it's best to ask him about the technical**
20 **meaning of that term. We are concerned about temporary**
21 **impacts to wetlands in that in general if a wetland is**
22 **excavated or otherwise impacted and then restored,**
23 **there is a real time loss in the function of that**
24 **wetland while it's being excavated for, say a pipeline**
25 **trench, something like that, that wetland is not there.**

1 **right-of-way of some road or something and they didn't**
2 **feel that they would be able to condemn that property**
3 **to put a buffer on that particular wetland.**

4 **Q. Isn't that additional property needed for an**
5 **appropriate upland buffer for that Wetland B5?**

6 **A. I can't answer that question. That would be**
7 **a technical issue for Katie Walter or Erik Stockdale to**
8 **address.**

9 **Q. Do you agree at least that it is a --**
10 **provides less protection for that Wetland B5 than what**
11 **the August 10 certification provided?**

12 **A. Yes.**

13 **Q. All right. Turn to Page 14 of the**
14 **certification. We're looking at the September 21**
15 **certification. Let's talk about the conditions for the**
16 **acceptance of fill to be used in the construction of**
17 **the third runway and associated Master Plan**
18 **improvements.**

19 **Why did Ecology include conditions relating**
20 **to the conditions for fill acceptance?**

21 **A. Why did we include this section that**
22 **established fill criteria?**

23 **Q. Right, why did Ecology include conditions for**
24 **fill acceptance in its 401 Certification?**

25 **A. Right. Well, there is a history to this.**

AR 028781

1 This is work that Tom Luster actually started three or
2 four or five years, I'm not sure how long, ago with
3 Roger Nye in our Northwest Regional Office Toxic
4 Cleanup Program in an attempt to provide some
5 parameters to the Corps' restriction on fill, which is
6 very simply, quote, no toxic materials in toxic
7 amounts, end quote, shall be placed in waters of the
8 US. So what finally ended up in this certification is
9 the culmination of work that Ecology has undertaken
10 over a several year period to develop criteria that
11 will be applied to fill used -- well, fill used in
12 filling wetlands of the state -- which are waters of
13 the state.

14 Q. Why did Ecology believe there was a need to
15 put parameters on the Corps' language that there would
16 be no toxic materials in toxic amounts into waters of
17 the state?

18 A. My understanding was that the concern was, on
19 Mr. Luster's part and others, that that's very vague,
20 that's broad. There are no numeric or qualitative
21 criteria attached to that, so we wanted to establish a
22 clear set of standards that were understood by the Port
23 and us and that could be clearly shown whether or not
24 the Port was in compliance with those standards.

25 Q. So is the purpose of the conditions in

1 water and groundwater quality would be protected.

2 Q. So how does someone that's not familiar with
3 the project determine whether one of the projects
4 that's going to be undertaken out at the airport is an
5 other appropriate Master Plan improvement to which
6 these conditions apply?

7 A. Well, the first criteria that we are using is
8 whether or not this is fill that will be placed in
9 waters of the state, so if there are projects that
10 involve wetland fill, which is direct discharge of
11 material into waters of the state, then that is clearly
12 an area where Port -- I'm sorry, where these fill
13 criteria apply.

14 We are also in the process of reviewing the
15 list of Master Plan update improvements against another
16 set of criteria that we are still in the process of
17 defining, which include looking at proximity of a
18 project to surface water and the proximity or the depth
19 to groundwater, so proximity to surface or groundwater
20 and trying to, you know, see if there is a likelihood
21 that the placement of fill, should the fill criteria
22 for some reason not work -- I mean, the whole
23 assumption is that the fill criteria do provide us with
24 a level of assurance that water quality standards will
25 not be violated or water quality will not be

1 Section E of the certification to minimize the impact
2 to wetlands or other waters of the state from
3 contaminants within the fill?

4 A. The purpose of these criteria is to go beyond
5 minimizing the effect of any potential contaminants but
6 to reach an order where we believe that those -- any
7 contaminants that do possibly make it into the fill
8 will not have an adverse impact on water quality.

9 Q. And when you use the term water quality, are
10 you including groundwater?

11 A. Yes.

12 Q. What is your understanding with respect to
13 the language on Page 14 at the bottom where it says,
14 The conditions will apply to other appropriate Master
15 Plan updated improvements as determined by Ecology?

16 A. By way of some background, we determined that
17 there was more clarity needed in exactly which projects
18 the fill criteria should apply to out at the airport
19 given that there are numerous projects going on on
20 airport facilities that have no relationship to the
21 Third Runway Projects at all. They are not Master Plan
22 update projects, they are other types of projects going
23 on. So to define more narrowly exactly which of these
24 projects we wanted the fill criteria to apply to so
25 that we would be ensured that water quality -- surface

1 degraded.

2 But if on the off chance, then we want to be
3 sure that we've required fill in locations where there
4 is a likelihood to be an impact there has to be a nexus
5 to impact to surface or groundwater before we believe
6 that we have the jurisdiction to require these fill
7 requirements.

8 Q. And you are determining that nexus to surface
9 water or groundwater spacially?

10 A. That's one of the set of criteria we are
11 using.

12 Q. Are there any other criteria you are using?

13 A. We haven't worked out these criteria in
14 complete detail yet. We are involved or we have
15 been -- we've met with the Port once or twice to
16 discuss fill criteria, to identify some of these
17 projects. We know that if the Port passes the hurdle
18 of the 404 and the legal hurdles, then they have a
19 phased approach to their development, and the first
20 area of their impact would be in the Miller Creek area
21 and also the 154th Street location. We have determined
22 that those two projects are clearly projects where the
23 fill criteria would apply.

24 Q. Are these criteria written down anywhere --

25 A. No.

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19 (Pages 261 to 264)

1 Q. -- that you're applying? Who is applying
 2 them?
 3 A. **It's under discussion between Ecology and the**
 4 **Port.**
 5 Q. Who at Ecology?
 6 A. **Me, Rod Thompson, and Ed Abbasi.**
 7 **(Discussion off the record.)**
 8 Q. (BY MR. STOCK) Is the TRACON facility a Port
 9 404 project?
 10 A. **I'm having a hard time right now remembering**
 11 **where the TRACON facility is or where it fits on their**
 12 **master list of projects.**
 13 Q. North of the existing air field up in the
 14 Lake Reba area?
 15 A. **It hasn't been built, though, right?**
 16 Q. No, it hasn't.
 17 A. **No, I don't believe that it is because that's**
 18 **an FAA project.**
 19 Q. Have you, Ed Abbasi or Rod Thompson applied
 20 these criteria that you are using to determine whether
 21 the TRACON facility is going to be subject to the fill
 22 criteria in Condition E of the 401 Certification?
 23 A. **No, we haven't. We don't even have an**
 24 **application before us for a 401, to my knowledge, for**
 25 **that facility.**

1 provide documentation to Ecology certifying that the
 2 fill source meets the criteria of the 401
 3 Certification?
 4 A. **Well, what the document says is that prior to**
 5 **accepting any fill materials for use on Port 404**
 6 **projects the Port shall submit to Ecology's Federal**
 7 **Permit Manager Sea-Tac Third Runway documentation**
 8 **certifying that the proposed fill source meets the**
 9 **criteria of this order.**
 10 Q. Has the Port done that with respect to any
 11 fill source or proposed fill source?
 12 A. **The Port is not presently filling in an area**
 13 **that would trigger these particular fill criteria.**
 14 Q. So the fill criteria set out in Condition E
 15 of the September 21 401 Certification have yet to be
 16 applied; is that what you're saying?
 17 A. **That's correct.**
 18 Q. And that's because the Port isn't presently
 19 filling in the area that would trigger these fill
 20 criteria?
 21 A. **That's correct.**
 22 Q. What will trigger these fill criteria in
 23 Condition E of the 401 Certification?
 24 A. **The trigger will be when they get their 404**
 25 **and the legal issues under litigation are resolved such**

1 Q. Have you ever heard of the TRACON facility?
 2 A. **I've certainly heard the name.**
 3 Q. In what context?
 4 A. **In the context that that facility is adjacent**
 5 **to this Wetland A17 complex where we are requiring the**
 6 **additional mitigation, the two properties, they abut**
 7 **each other.**
 8 Q. Other than the development in the Miller
 9 Creek area and the 154th Street location, have you
 10 performed a review of any other Port project to
 11 determine whether these fill criteria will apply?
 12 A. No.
 13 Q. Why not?
 14 A. **Simply time constraints involved in managing**
 15 **this project. We know that if, like I said, all the**
 16 **hurdles are passed, that will be the first area that**
 17 **they are constructing, we anticipate that this will be**
 18 **an iterative process that we can identify areas -- the**
 19 **Port already knows their construction schedule. I**
 20 **haven't seen their complete construction schedule, but**
 21 **as we go along we can make that determination whether**
 22 **the fill criteria are required or not.**
 23 Q. Turn over to Page 15 of the certification.
 24 Is it true that for each of the sites from which the
 25 Port is going to obtain fill material the Port must

1 **that they have their administrative order reinstated,**
 2 **which are currently in limbo because of the stay**
 3 **decision by the Pollution Control Hearings Board.**
 4 Q. Well, that suggests the question to me, what
 5 fill criteria are currently being applied, then, to the
 6 fill that is being imported out to the third runway
 7 site every day currently?
 8 A. **It's my understanding that there is a**
 9 **memorandum of agreement that was based on the original**
 10 **work done by Tom Luster and Roger Nye that set forth**
 11 **certain criteria that the Port is complying with and is**
 12 **submitting documentation to Ecology in support of.**
 13 Q. And what is this memorandum of agreement?
 14 A. **I don't have that readily in mind. It is a**
 15 **precursor of what actually ended up into this**
 16 **certification, but what it actually says I haven't**
 17 **seen.**
 18 Q. Is this a written memorandum of agreement?
 19 A. **I believe so.**
 20 Q. Who is reviewing whether the Port is
 21 complying with this memorandum of agreement regarding
 22 the fill that's currently being imported to the third
 23 runway site?
 24 A. **The Northwest Regional Water Quality Program.**
 25 Q. Who within that program?

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1 **A. John Drabek was receiving those reports while**
2 **he was the NPDES permit manager for the industrial**
3 **waste permits and Ed Abbasi is now receiving those**
4 **reports.**

5 Q. What are those reports called?

6 **A. I'm not sure.**

7 Q. You're not involved in the review of those
8 reports?

9 **A. No, I'm not.**

10 Q. How can I get a copy of this memorandum of
11 agreement?

12 **A. Include it in your next public disclosure**
13 **request.**

14 Q. Well, I suppose we will specifically ask for
15 that document, but as you know, ACC has a continuing
16 public disclosure request.

17 **A. Have Andrea send me an e-mail. She's very**
18 **good at that.**

19 MR. REAVIS: I think they are actually marked
20 as exhibits in other depositions. I'm not sure if they
21 are the same documents she is talking about.

22 Q. (BY MR. STOCK) Are you referring to the 1999
23 fill acceptance criteria agreement?

24 **A. I don't know. The only way I could tell you**
25 **exactly what is being operated under would be to go**

1 **back to the Water Quality Program and ask them to**
2 **provide me a copy of exactly the document that they are**
3 **using. It may be the same document, if that's**
4 **information you got from Kevin Fitzpatrick or John**
5 **Drabek or someone.**

6 Q. Under the fill criteria in the 401
7 Certification, how many samples is the Department of
8 Ecology going to require the Port to obtain for a
9 borrow source where they will import one million cubic
10 yards of fill?

11 MR. REAVIS: Object to the extent the
12 document speaks for itself.

13 **A. On Page 16 there is a table at the bottom of**
14 **the page that specifies a minimum sampling schedule,**
15 **and it appears that for sources that involve more than**
16 **100,000 cubic yards of soil we would require a minimum**
17 **of six samples.**

18 Q. (BY MR. STOCK) So my question is, for a
19 borrow source where the Port is going to import one
20 million cubic yards how many samples will the
21 Department of Ecology require under the September 401
22 Certification?

23 **A. A minimum of six.**

24 Q. From your answer I gather you can't tell me
25 how many samples other than a minimum of six?

1 **A. That's correct.**

2 Q. So for a site where the Port is proposing to
3 import a million cubic yards of fill the Port can
4 present six samples for that fill source to the
5 Department of Ecology under the 401 Certification; is
6 that correct?

7 **A. That's something where it is going to really**
8 **depend on the source of the fill. If the fill is**
9 **coming from an area with suspected contamination, and**
10 **I'm quoting from the certification, identified by the**
11 **Phase I environmental site assessment or with complex**
12 **site conditions -- this is Page 17, the first whatever**
13 **right before Section B -- or with complex site**
14 **conditions, please consult with Ecology's Federal**
15 **Permit Manager Sea-Tac Third Runway for appropriate**
16 **sampling requirements.**

17 Q. And you are the Federal Permit Manager for
18 Sea-Tac Third Runway, correct?

19 **A. That's correct.**

20 Q. So the Port, when it wants to import a
21 million cubic yards from a fill source, will be
22 consulting with you; is that right?

23 **A. They will bring this issue to my attention**
24 **and I will delegate that review to appropriate staff.**

25 Q. You agree that the 401 Certification as it is

1 currently written allows the Port to submit six samples
2 for that fill source where it's going to import a
3 million cubic yards?

4 MR. REAVIS: Objection, the document speaks
5 for itself, mischaracterizes the witness's testimony.

6 Q. (BY MR. STOCK) I'm neither attempting to
7 speak for the 401 Certification, what you meant when
8 you wrote it, Ms. Kenny, or trying to mischaracterize
9 your testimony. What I need to find out from you as
10 the author of this 401 Certification is whether under
11 this 401 Certification it allows the Port to submit six
12 samples for a fill source from where it's going to
13 import one million cubic yards?

14 **A. I would say that if it's one source and it's**
15 **a million cubic yards, that might well fall under a**
16 **site with complex site conditions. It's really going**
17 **to be site specific. They can submit us six samples,**
18 **but this latter paragraph that I've been quoting from**
19 **gives us the authority to ask questions and not -- and**
20 **to say six is not enough, given whatever.**

21 **Now, I did not write this section. This**
22 **section was given to me by Chung Yee and Kevin**
23 **Fitzpatrick. In talking with them, it's my**
24 **understanding that the intent was that we always had**
25 **the ability to question the number of samples; that's**

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1 why the certification says minimum. And this is a very
2 general, I mean, there may be a source of fill out
3 there where we know that there is complete uniformity
4 of that fill, it's a huge gravel pit that was left over
5 from the last glaciers that went through and it's all
6 the same materials, so six samples may be totally
7 adequate.

8 Q. So you agree that in the absence of Ecology
9 guidance to the Port, that the Port can submit six
10 samples for a site from which it's going to import one
11 million cubic yards?

12 A. Yes.

13 Q. At your last deposition I marked a copy of
14 your July 29 e-mail to various people attaching a draft
15 of the 401 Certification, and it was marked as Exhibit
16 71. When we go back and look at the exhibits that were
17 actually marked, this is marked as Exhibit 71. So I
18 need to clear up on the record that Exhibit 71 is your
19 July 29th, 2001 e-mail with a time of 2:43 p.m., and I
20 guess to do that and to make sure that that July 29
21 e-mail is in the record I need to mark it as another
22 deposition exhibit.

23 MS. MARCHIORO: Okay. Before we go too far
24 along, I'm trying to understand, was there a mistake on
25 somebody's part and this is not an exhibit to her

1 deposition?

2 MR. STOCK: That is. What you've got now
3 with the No. 71 on it is the physical exhibit. But in
4 the transcript, if you go back to the point where
5 Exhibit 71 was marked, we were discussing and Ms. Kenny
6 identified her July 29 e-mail as Exhibit 71.

7 MR. REAVIS: Do you know where that is in the
8 transcript? I've got a copy here.

9 MS. MARCHIORO: Do you want to go off the
10 record and talk about this?

11 MR. STOCK: Sure.
12 (Discussion off the record.)

13 (Deposition Exhibit No. 446 was marked for
14 identification.)

15 Q. (BY MR. STOCK) Ms. Kenny, you've been handed
16 Exhibit 446. Can you identify Exhibit 446?

17 A. **This is an e-mail I sent on July 29, 2001, to
18 various recipients with a preliminary draft of the 401
19 Water Quality Certification for review and feedback.**

20 Q. And just so the record is clear, this may
21 also have been marked as Exhibit 71 at your prior
22 deposition. Do you recall talking about this?

23 A. **I do recall discussing this particular
24 document.**

25 Q. Look at Page 10 of Exhibit 446.

1 MS. MARCHIORO: When you say Page 10 --

2 Q. (BY MR. STOCK) What's labeled as Page 10.

3 A. Yeah.

4 Q. At the top of Page 10 of the draft 401 is a
5 paragraph in bold. Did you write that paragraph?

6 A. **No, I did not.**

7 Q. Who wrote that paragraph?

8 A. **I believe it was Chung Yee.**

9 Q. And is it true that the Toxics Cleanup
10 Program had recommended to you that the guidance for
11 the sampling of petroleum-contaminated fill should be
12 governed by Ecology Publication No. 91-30?

13 MR. REAVIS: Objection, lack of foundation.

14 A. **I can't say. I didn't author this paragraph.**

15 Q. (BY MR. STOCK) What was your understanding
16 as to the Toxic Cleanup Program's position with respect
17 to the level of sampling of petroleum-contaminated
18 fill?

19 A. **I had no understanding of what their
20 recommendation was. I wasn't involved with the
21 development of these criteria.**

22 Q. Who did you rely upon to conclude that these
23 criteria were sufficient to protect water quality
24 standards? And when I say these criteria, I'm talking
25 about the criteria set forth in Condition E of the

1 September 21 401 Certification.

2 A. **These criteria were forwarded to me by Kevin
3 Fitzpatrick and the Water Quality Program as the
4 criteria that should go into the 401 Water Quality
5 Certification.**

6 Q. So you relied upon Kevin Fitzpatrick?

7 A. **I did.**

8 Q. Did you rely upon anyone else to make the
9 recommendation that the criteria set forth in
10 Condition E of the 401 Certification were sufficient to
11 provide reasonable assurance that state water quality
12 standards would not be violated?

13 A. **No.**

14 Q. You didn't make any independent assessment or
15 review in that regard; is that correct?

16 A. **That's beyond my area of expertise.**

17 Q. I take it you don't have any opinion with
18 respect to whether six samples or 226 samples for a
19 200,000 cubic yard stockpile would be appropriate in
20 terms of determining whether that stockpile was an
21 appropriate fill source for the third runway site?

22 A. **I don't have an opinion about the number of
23 samples. I do believe that the fill criteria are very
24 clear in prohibiting the use of any soils that are
25 determined to be contaminated following a Phase I or**

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1 **Phase II site assessment, which would capture**
2 **petroleum-contaminated soils.**

3 Q. I just want to make sure. You don't have any
4 opinion --

5 A. No.

6 Q. -- whether for a 200,000 cubic yard stockpile
7 it would be appropriate to make an assessment based
8 upon six samples or 226 samples?

9 A. No, I don't have the expertise to do that.

10 Q. When you said that it's your understanding
11 that these fill acceptance criteria in the 401
12 Certification prohibit the importation of any fill
13 found to be contaminated after a Phase I or Phase II
14 site assessment, what did you mean by that?

15 A. It's very plain within the meaning -- within
16 the plain language of the certification on Page 18,
17 Subsection D, Prohibited Fill Sources. The following
18 fill sources are prohibited for use on Port 404
19 projects, first bullet, fill which consists in whole or
20 in part of soils or materials that are determined to be
21 contaminated following a Phase I or Phase II site
22 assessment.

23 Q. How are you as Ecology's Federal Permit
24 Manager going to make the determination whether the
25 fill is contaminated following a Phase I or Phase II

1 pursuant to a Phase II site assessment to be compared
2 against the fill criteria on Page 17 of the 401
3 Certification?

4 A. Well, no, because if it's found to be
5 contaminated under Phase II it's prohibited from use.

6 Q. So if that's the case, why are the fill
7 criteria set out on Page 17 needed?

8 A. That's a relic of I believe this earlier
9 version that was provided to me by Chung Yee, and after
10 I got this version and incorporated it into this draft
11 I had comments back from Kevin -- oh, no, no, no,
12 that's not where we left it. What he had intended and
13 what he later submitted to me was a version that very
14 clearly prohibited the use of that material. Now, if
15 you look back to this July 29th e-mail, there is all
16 these bases for the criteria and then it talks about
17 heavy oils and all of that.

18 It had been left that for hazardous
19 substances -- this is the very bottom of Page 12 of
20 that draft -- for hazardous substances other than those
21 identified in the above fill criteria table that have
22 been identified in the Phase II environmental site
23 assessment please consult with the Department of
24 Ecology Northwest Regional Offices Water Quality
25 Program for applicable fill criteria, and we didn't

1 site assessment?

2 A. Well, the way I envision this working is that
3 Ecology would probably never hear about those fill
4 sources because the Port would reject them out of hand
5 for use as fill for Port 404 projects.

6 Q. What do you understand or what does it mean
7 when the 401 Certification on Page 18 says determined
8 to be contaminated following a Phase I or Phase II site
9 assessment?

10 A. Phase I or Phase II is terminology I believe
11 that derives from our model Toxics Control Act or it's
12 certainly terminology that our Toxics Cleanup people
13 are familiar with and the Port's technical people are
14 familiar with. I had asked that when we were reviewing
15 this what does that mean, and I was assured that that's
16 a commonly understood technical phrase with very
17 specific links to statutory or guidance requirements.

18 Q. But you as the Ecology's Federal Permit
19 Manager don't know what it means; is that right?

20 A. That's correct. I believe that Phase I is
21 more of a general review of the record for a property.
22 Phase II probably involves more site specific
23 investigation and actual analysis of soil samples.

24 Q. Does the 401 Certification require the
25 comparison of any contaminants found at a fill source

1 want that. We said if it's been contaminated and it's
2 found to be contaminated from Phase II, it's
3 prohibited, period.

4 So I can't exactly explain why these
5 parameters for diesel and heavy oils are there, but I
6 believe it was an oversight or a remnant from this
7 earlier version that didn't get taken out. Because
8 it's my understanding, the way it's been explained to
9 me by Kevin and others, that, you know, if it fails
10 Phase II, which addresses primarily heavy oils,
11 contaminated petroleum products, then that simply is
12 not going to be allowed as fill, and even if it's been
13 remediated it will not be allowed to be used as fill.

14 So we're very stringent on what we require.
15 If it's even suspected or if it's determined to be
16 contaminated and it's been treated or remediated, that
17 material is prohibited, so I suspect that we're not
18 going to find fill that has diesel or heavy oils in it.

19 Q. So is it Ecology's position that under the
20 401 Certification no fill from a source where a
21 Phase II site assessment finds total petroleum
22 hydrocarbons will be allowed to be imported to the
23 third runway site?

24 MR. REAVIS: Object to the extent that the
25 document speaks for itself.

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23 (Pages 277 to 280)

1 **A. That's true to the extent that my**
2 **understanding of what that Phase II assessment is**
3 **correct. I don't know exactly what that looks like**
4 **without going to look at the procedures themselves, but**
5 **that's my belief at this point.**

6 Q. (BY MR. STOCK) Wait a minute. I thought you
7 just told me that the Department of Ecology's intent is
8 not to allow any contaminated fill following a Phase II
9 site assessment to be imported to the third runway
10 site; is that right?

11 **A. That's correct.**

12 Q. That's what Ecology means under the 401
13 Certification; is that right?

14 **A. That's correct.**

15 Q. And if a Phase II site assessment finds TPH
16 contamination -- you know what TPH is, don't you?

17 **A. Total petroleum hydrocarbon.**

18 Q. If a Phase II site assessment finds TPH
19 contamination at a fill source, is it Ecology's
20 position that fill from that source cannot be imported
21 to the third runway site under the 401 Certification?

22 MR. REAVIS: Object to the extent that the
23 401 Certification states Ecology's position and speaks
24 for itself.

25 **A. That's correct.**

1 Q. (BY MR. STOCK) So why doesn't Ecology issue
2 a revised certification taking out the fill criteria on
3 Page 17 of the September 401 Certification?

4 **A. We could.**

5 Q. Is Ecology going to do that?

6 **A. It hasn't even been requested of us by the**
7 **Port.**

8 Q. Is that what will be determinative of whether
9 Ecology takes out that fill criteria set out on Page 17
10 of the 401 Certification?

11 **A. No, it will be Ecology's determination what's**
12 **in the 401.**

13 Q. Ms. Kenny, what does Ecology mean on Page 17
14 of the 401 Certification under Subparagraph B when it
15 states, The results of the Phase II site assessment
16 sampling and testing shall be compared to the fill
17 criteria to determine the suitability of the fill
18 source for Port 404 projects?

19 **A. If there is a source that the Port is**
20 **considering using, and I would say regardless of the**
21 **source, whether it's gone through a Phase II**
22 **environmental site assessment or it's from Port owned**
23 **borrow sites or state certified pits, then they need to**
24 **demonstrate that the soils do not exceed the criteria**
25 **set forth in the certification, which is another odd**

1 remnant here.

2 **These criteria on Page 17 are not the**
3 **final -- are not the criteria that are being applied to**
4 **some of the fill. Those criteria are found -- the**
5 **definitive list of criteria that is found -- that**
6 **applies to fill for Port 404 projects is found on the**
7 **last page of Attachment E to the September 21st, 2001**
8 **certification.**

9 Q. So Ecology's position is that the last page
10 of Attachment E contains the fill acceptance criteria
11 that is to be applied?

12 **A. That is correct.**

13 Q. And how did you come to that understanding?

14 **A. That's the understanding that we had when we**
15 **issued this permit on September 21st.**

16 Q. Why does the list that's the last page of
17 Attachment E contain criteria for gasoline, diesel and
18 heavy oils?

19 **A. Again, that's a remnant of what was in this**
20 **table in the -- would have been the August 10th version**
21 **of the permit.**

22 Q. So I just want to make sure what Ecology's
23 position is, and it's Ecology's position that the fill
24 criteria for gasoline, diesel and heavy oils in Table 1
25 of Attachment E are no longer applicable because

1 Ecology is not going to allow any fill to be imported
2 to the third runway site from borrow sources where
3 there is TPH contamination present?

4 MR. REAVIS: Object to the extent the
5 document speaks for itself as to Ecology's position.

6 **A. That's correct. In looking at this**
7 **Section E, if I had written it myself or if I had had**
8 **more time, I would have put this -- and this was our**
9 **intent, that the foundational condition to all the**
10 **other conditions is this Sub D, Prohibited Fill**
11 **Sources, so that would have made a whole lot more sense**
12 **to have put it right up front. So that's the baseline,**
13 **that's clearly material that's prohibited, and then if,**
14 **you know, if it's not prohibited, then it needs to meet**
15 **the fill criteria that are outlined in this Table 1 of**
16 **Attachment E.**

17 MR. STOCK: Let's mark this as the next
18 exhibit.

19 (Deposition Exhibit No. 447 was marked for
20 identification.)

21 Q. (BY MR. STOCK) You've been handed Exhibit
22 447. There is a reference to KCS on the top that
23 wasn't on the original document. Obviously, those are
24 my initials.

25 Identify Exhibit 447 for me, please.

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24 (Pages 281 to 284)

1 **A. Exhibit 447 is an e-mail from Joan Marchioro**
2 **with the State's Attorney General's office to Tom**
3 **Walsh, Tom Newlon, Jay Manning, with a copy to Ray**
4 **Hellwig and myself, regarding draft settlement**
5 **agreement and SPLP work plan.**

6 Q. And what involvement did you have with
7 respect to this draft settlement agreement and SPLP
8 work plan?

9 **A. If I could take a moment to refresh my**
10 **memory. (Witness reviewing document.)**

11 **I was involved in the settlement discussions**
12 **with the Port prior to their filing their appeal and**
13 **simultaneous settlement in early September, or whenever**
14 **that was.**

15 Q. The appeal of the August 10 401
16 Certification, correct?

17 **A. That's correct.**

18 Q. And this proposed settlement agreement is the
19 document where Ecology and the Port were negotiating
20 over revisions to the August 10 401 Certification; is
21 that right?

22 **A. This sets forth our understanding at -- no,**
23 **actually -- I remember.**

24 **This was our attorney Joan Marchioro's**
25 **attempt to write down the understandings that we had**

1 Q. Did you have any discussions with Kevin
2 Fitzpatrick concerning revising the 401 Certification
3 to allow for SPLP testing of fill sources?

4 **A. Yes.**

5 Q. And when did those conversations occur?

6 **A. Somewhere around this time frame of the end**
7 **of September -- the end of August, early September.**

8 Q. And tell me about those discussions that you
9 had with Mr. Fitzpatrick regarding the revision of the
10 401 Certification fill criteria.

11 **A. I explained to him that we had heard concerns**
12 **from the Port that the fill criteria that we had put in**
13 **our August 10th certification were inconsistent with**
14 **the fill criteria being required by the US Fish and**
15 **Wildlife Service and that those inconsistencies were a**
16 **problem for the Port in maintaining their concurrency**
17 **with the service's ESA review.**

18 Q. So what did Mr. Fitzpatrick say?

19 **A. Well, after I told him that the Port was --**
20 **what the Port was proposing to resolve this difficulty**
21 **would be to bring the two sets of conditions into**
22 **conformity with each other and that that would include**
23 **allowing the Port to apply SPLP testing to proposed**
24 **fill that failed the numeric criteria of the**
25 **certification and also that the Port proposed that they**

1 **reached through a series of a day or two meetings and**
2 **phone conversations where we had reached tentative**
3 **agreement regarding what the settlement agreement would**
4 **contain, so this was a draft that she was sending out**
5 **to various parties involved in the negotiations for**
6 **comment.**

7 Q. Turn over to Page 3 of the draft settlement
8 agreement, and let's focus for a minute on the proposed
9 revisions to the fill acceptance criteria Condition E
10 of the 401 Certification. Who proposed revising the
11 fill acceptance conditions to include the SPLP?

12 **A. The Port did.**

13 Q. Who on behalf of Ecology reviewed the Port's
14 proposal to revise the fill acceptance criteria of the
15 401 Certification to include a provision for SPLP?

16 **A. I was aware of this -- certainly aware of**
17 **this proposal. It was approved by Kevin Fitzpatrick.**

18 Q. Kevin Fitzpatrick?

19 **A. Of the water quality -- Northwest Regional**
20 **Offices Water Quality Program.**

21 Q. Did Kevin Fitzpatrick negotiate directly with
22 Tom Walsh, Tom Newlon or Jay Manning?

23 **A. I don't know if he did -- I don't believe**
24 **that he did. I believe that all of those discussions**
25 **were mediated through our attorneys.**

1 **would adopt the most stringent of the 401 fill criteria**
2 **and the US Fish and Wildlife Service criteria as their**
3 **baseline, so what he said to that was, Sounds good.**

4 Q. Was this just one conversation you had with
5 Mr. Fitzpatrick?

6 **A. It may have been one or two.**

7 Q. And did Mr. Fitzpatrick have in front of him
8 when you talked to him the proposed revisions to the
9 fill acceptance criteria?

10 **A. I believe that those were faxed to him.**

11 MR. STOCK: Let's go off the record.

12 (Discussion off the record.)

13 MR. STOCK: Let's go back on the record.

14 Q. (BY MR. STOCK) Did you discuss with
15 Mr. Fitzpatrick the Port's proposed revisions?

16 **A. Yes.**

17 Q. And did he tell you he had them in front of
18 him?

19 **A. I don't think he had them in front of him**
20 **perhaps at the time we were -- the first time we**
21 **discussed them. I do recall later, near the time when**
22 **we were wrapping up the settlement agreement, that he**
23 **did have them in front of him.**

24 Q. Did Mr. Fitzpatrick have anything to say with
25 respect to revising the 401 Certification to include an

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1 SPLP testing procedure?
 2 A. He thought it was reasonable.
 3 Q. You recall Mr. Fitzpatrick saying that?
 4 A. Uh-huh.
 5 Q. You need to answer audibly for the court
 6 reporter.
 7 A. Yes, he said that.
 8 Q. What else did he say with respect to
 9 including an SPLP testing procedure in the 401
 10 Certification?
 11 A. I don't recall much else.
 12 Q. Did he tell you how including an SPLP testing
 13 procedure was consistent with the language contained in
 14 Section E(d), Prohibited Fill Sources?
 15 A. We discussed -- I do recall discussing the
 16 use of the Synthetic Precipitation Leaching Procedure
 17 with him, and we discussed the use of that test and its
 18 similarity to another test that I am familiar with used
 19 for hazardous waste designation purposes called the
 20 Toxics Characteristic Leaching Procedure, which is
 21 another EPA test protocol for determining if a
 22 constituent will leach a harmful constituent -- a
 23 material will leach harmful constituents under acid
 24 conditions.
 25 And these two tests apparently are equivalent

1 A. I asked him if this was something that he had
 2 considered, and he said no. I asked why not, he said
 3 we simply don't have the resources to review any more
 4 additional testing information from the Port. And I
 5 said, Well, Kevin, you're aware that the Port has
 6 agreed to fund positions at Ecology, three to five
 7 FTEs, to do technical review if we dedicate part of
 8 that allocation to reviewing these tests. Do you feel
 9 that this testing procedure is reasonable, he said yes.
 10 Q. That doesn't answer my question as to why
 11 Ecology allowed the SPLP procedure to be included in
 12 the revised 401 Certification if Ecology under the 401
 13 Certification is going to prohibit the use of fill
 14 which consists in whole or in part of soils or material
 15 that are determined to be contaminated following a
 16 Phase I or Phase II site assessment.
 17 A. Petroleum contaminated soils are not the only
 18 contaminated soils that might cause -- or the only
 19 contaminant sources that might be a problem for
 20 imported fill. Other constituents which are found in
 21 natural -- are found naturally in soil such as arsenic
 22 or lead or zinc may exist at levels that are above
 23 background in the soil that may pose a problem for
 24 water quality purposes. So the SPLP test allows us to
 25 look at those other constituents and determine if there

1 in their accuracy and their usefulness, and what this
 2 test tells you is that when you expose soil for the
 3 SPLP test to acid conditions it will tell you whether
 4 constituents that are bound up in the material such as
 5 lead, whatever, will break down -- the acid will cause
 6 that compound to break down and leach lead, for
 7 example.
 8 Q. I don't mean to interrupt you, Ms. Kenny, but
 9 you're getting far afield from my question.
 10 A. Well, we had that technical discussion of
 11 what the test does and what it shows you and that if it
 12 passes the SPLP test then we know that whatever
 13 chemical process occurred it's not going to be harmful
 14 to the environment, because the lead, for example,
 15 would not be in a format that would be readily movable
 16 or absorbable by a biological organism.
 17 Q. My question is, did you and Mr. Fitzpatrick
 18 discuss why Ecology should allow an SPLP testing
 19 procedure as a part of the 401 Certification given that
 20 the 401 Certification prohibits the use of fill which
 21 consists in whole or in part of soils or material that
 22 are determined to be contaminated following a Phase I
 23 or Phase II site assessment.
 24 A. Yes.
 25 Q. And what was said in that regard?

1 is any real threat or harm by having elevated levels in
 2 a particular batch of fill -- I've lost my thought.
 3 MR. STOCK: Why don't you go ahead and read
 4 the question and go ahead and read her answer.
 5 (The reporter read back as requested.)
 6 Q. (BY MR. STOCK) Do you want to start over,
 7 Ms. Kenny?
 8 A. No. I got halfway through my thought and
 9 then I just lost it.
 10 MR. STOCK: Do you mind reading it back,
 11 Kathy.
 12 (The reporter read back as requested.)
 13 A. -- with those constituents, end of sentence.
 14 Q. (BY MR. STOCK) So is it Ecology's position
 15 that under the 401 Certification the SPLP procedure can
 16 only be used to assess naturally occurring substances?
 17 MR. REAVIS: Objection, the document speaks
 18 for itself.
 19 A. I would like to look through Attachment E to
 20 Exhibit 1. (Witness reviewing document.)
 21 The SPLP test can be used for any soils
 22 proposed to be imported or used by the Port for Port
 23 404 projects that are not specifically prohibited by
 24 the 401. And so we have various fill sources that are
 25 prohibited, and then we limited the remainder of the

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1 sources to state certified borrow pits, contractor
2 certified construction sites, and Port of Seattle owned
3 properties. That's Subsection C on Page 18. So any
4 source that's not prohibited that comes from these
5 three sources, if those fill materials are showing
6 levels of a constituent that exceed the levels
7 identified in Table 1 of Attachment E, then the Port
8 can apply SPLP testing to determine the suitability of
9 that fill.

10 Q. (BY MR. STOCK) So is it Ecology's position
11 that the SPLP procedure may only be used to determine
12 the suitability of fill from state certified borrow
13 pits, contractor certified construction sites, or Port
14 of Seattle owned properties?

15 A. Yes, because those are the only sources of
16 fill that will be allowed to be imported or used for
17 fill.

18 Q. What is Ecology's position with respect to
19 contractor certified construction sites where TPH
20 contamination is present?

21 A. Well, if a contractor is going to have to
22 certify that they have done Phase I or Phase II testing
23 and if that material -- that soil doesn't pass the
24 Phase I or Phase II assessment, it's prohibited; they
25 can't certify that it would meet our fill criteria.

1 Q. So what is the standard under a Phase II site
2 assessment to determine whether it passes a Phase II
3 site assessment?

4 A. I can't answer that.

5 Q. You can't tell me as Ecology's Federal Permit
6 Manager what it means when that Condition E
7 Subparagraph D says that fill from sources where
8 materials are determined to be contaminated following a
9 Phase I or Phase II site assessment, what that means?

10 A. Today sitting here I could tell you only in
11 very general terms as I described earlier. To give you
12 or anyone else an absolutely clear understanding of
13 what that is I would have to go back to Kevin
14 Fitzpatrick and Chung Yee and look at exactly the
15 documents that spell out what is involved in a Phase I
16 or Phase II site assessment.

17 Q. Did Kevin Fitzpatrick approve provisions
18 regarding the fill acceptance criteria from the August
19 10 certification to the September 21 certification?

20 A. Yes.

21 Q. Has Ecology made any assessment of areawide
22 arsenic contamination within the Port's Third Runway
23 Project site?

24 A. There may -- Ecology is -- well, not Ecology.
25 The King County Health Department has undergone some

1 regional sampling for arsenic coming from the Tacoma
2 smelter plume. I'm not sure if any of those sampling
3 points specifically include the third runway area,
4 although I know that some of those samples include the
5 surrounding communities.

6 MR. STOCK: Go ahead and mark this as the
7 next exhibit.

8 (Deposition Exhibit No. 448 was marked for
9 identification.)

10 Q. (BY MR. STOCK) Identify 448 for the record,
11 please.

12 A. Exhibit 448 is an e-mail sent by Ray Hellwig
13 to me dated January 10th, 2002, forwarding an e-mail
14 message from Norm Peck sent January 10th to Steve
15 Alexander and Ray Hellwig concerning the third runway
16 and arsenic in the Tacoma smelter plume.

17 Q. What is your understanding as to why
18 Mr. Hellwig was sending you a copy of this e-mail from
19 Norm Peck?

20 A. He sent it to me so that I could follow up
21 with Mr. Peck regarding his concerns.

22 Q. And who is Mr. Peck?

23 A. Mr. Peck is an environmental specialist
24 employed by the Northwest Regional Office's Toxics
25 Cleanup Program, and he is working on arsenic

1 contamination issues related to the Tacoma smelter
2 plume.

3 Q. And what was Mr. Peck's concern that
4 Mr. Hellwig wanted you to follow up on?

5 A. Well, in this e-mail from Mr. Peck he says,
6 quote, Hi Steve and Ray. I think we in the TSP project
7 need to understand the rationale for allowing elevated
8 levels of metals, especially lead and arsenic, in the
9 fill for the third runway at Sea-Tac Airport. This was
10 raised by the City of Burien as a sensitive issue in
11 that community that is likely to be raised as we begin
12 the education process about the wide-area contamination
13 in the Southwest King County mainland.

14 There is a little more language, but
15 basically he and other cleanup program staff have been
16 having meetings with the community about the Tacoma
17 smelter plume, and when they met with the City of
18 Burien concerns were raised by participants in that
19 meeting about the fill and the fill criteria for the
20 Third Runway Project.

21 Q. So what did you do in response to this e-mail
22 from Ray Hellwig?

23 A. I went and I talked to Norm and I gave him a
24 copy of the 401 Certification fill requirements. And
25 actually what I gave him was what is attached -- is the

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27 (Pages 293 to 296)

1 document attached to I believe Exhibit 446, because it
2 was the earlier version of the fill criteria, and I
3 think I gave him the final fill criteria that included
4 Chung Yee's basis analysis for the fill criteria, so
5 that was the language that's in bold in Section E of
6 the draft, to explain the scientific basis for why
7 those fill criteria were being applied.

8 Q. Where does it explain in that draft, which is
9 Exhibit 446, Ecology's rationale for allowing elevated
10 levels of metals, especially lead and arsenic, in the
11 fill for the third runway site?

12 A. That's only a partial -- this is only a
13 partial piece of information. I have a meeting
14 scheduled on February 28th, next week, with Norm and
15 some other folks that are involved in this Tacoma
16 smelter plume project to explain that the fill criteria
17 do not allow elevated levels of metals, especially lead
18 and arsenic, because as you can very clearly see on
19 Table 1 of Attachment E to the September 21st 401, the
20 levels of lead and arsenic that are allowed for the
21 final drainage layer cover, which is that 40-foot wedge
22 above the drainage layer that descends at a two percent
23 grade to the east, contain levels for lead and arsenic
24 that are at Puget Sound background within the 90th
25 percentile.

1 Q. What about the rest of the fill embankment,
2 Ms. Kenny?

3 A. These criteria were based on -- I believe on
4 MTCA Level A upper bound limits, and the upper bound
5 limits and those technical references are discussed in
6 the biological opinion.

7 Q. What did you tell Mr. Peck was the rationale
8 for allowing elevated metals in the remainder of the
9 embankment other than the drainage layer of cover?

10 MR. REAVIS: Object to the question as vague
11 to the extent you used the term elevated.

12 A. What I told Mr. Peck was that the levels
13 developed in the 401 condition for the fill above the
14 drainage layer cover were, in my understanding,
15 designed to be protective of water quality for both
16 surface water and groundwater purposes.

17 Q. (BY MR. STOCK) What did Mr. Peck say in
18 response?

19 A. I asked him if he had a problem with the
20 information that I had given him, and he said, no, that
21 explained it.

22 Q. Have you had any further conversations with
23 Mr. Peck?

24 A. No. As I indicated, we have a meeting
25 scheduled for next week to further educate the cleanup

1 program people about what the conditions of the 401
2 require.

3 Q. So if Mr. Peck understood it, why is there
4 this meeting scheduled for February 28th with the
5 Toxics Cleanup Program?

6 A. Because there are other staff in the cleanup
7 program who are involved in this Tacoma smelter plume.
8 One is located in our Southwest Regional office which
9 covers Tacoma, and she -- her name is Molly Gibbs --
10 she is a public outreach person and she is the person
11 responsible for scheduling a lot of these public
12 meetings, and she wants to be able to understand the
13 issues so that she can clearly communicate to those
14 people that she meets with what is really being
15 required at the third runway site versus what the
16 public might think is being required.

17 Q. What is required under the 401 Certification
18 with respect to any fill source where there is a
19 determination by sampling that arsenic levels are at 15
20 milligrams per kilogram?

21 A. Well, I would refer to Table 1, looking at
22 Columns 4 and 5, which Column 4 is the final drainage
23 layer cover criteria, parens, most conservative of Fish
24 and Wildlife Service and Ecology values, end parens.
25 Column 5 is Ecology criteria for remainder of

1 embankment and other Port 404 projects. So if your
2 question is arsenic at 15 milligrams per kilogram, the
3 initial reading of that would be that it would not be
4 allowed for use in the final drainage layer cover.

5 Q. But it would be allowed --

6 A. But it could be used for the remainder of the
7 embankment.

8 Q. What is Ecology's position if a Phase II site
9 assessment determines that the level of contamination
10 of arsenic in the fill source is greater than 20
11 milligrams per kilogram?

12 A. The way I understand this works, because in
13 Attachment E we essentially incorporated the
14 conclusions of the US Fish and Wildlife biological
15 opinion by reference into the 401 -- where is this
16 described -- the upper bound limits are described as
17 the upper limit from MTCA -- which I believe in this
18 case is 20, if it's above 20 -- in no case can fill be
19 imported that exceeds 20 milligrams per kilogram.

20 Q. Under the 401 Certification can the Port use
21 the SPLP to try to pass the fill source where that fill
22 source contains greater than 20 milligrams per kilogram
23 of arsenic as determined by a Phase II site assessment?

24 A. No. And the basis for that is found on Page
25 2 of Attachment E, the second paragraph, which states,

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28 (Pages 297 to 300)

1 In accordance with the BO, upper bounds are established
2 for constituent concentrations that cannot be accepted
3 even following a successful SPLP test, parens, referred
4 to in this document as, quote, upper bound limits, end
5 quote, end parens, period.

6 Q. Let's run through another example so I'm sure
7 I understand Ecology's position on this. What is
8 Ecology's position where a Phase II site assessment
9 determines that the level of lead in a fill source is
10 greater than 250 milligrams per kilogram, can that fill
11 source be used under the 401 Certification?

12 A. No.

13 Q. Can the Port under the 401 Certification use
14 the SPLP to try to pass that fill source where a
15 Phase II site assessment shows lead contamination
16 greater than 250 milligrams per kilogram?

17 A. No.

18 MR. STOCK: Let's mark this as the next
19 exhibit.

20 (Deposition Exhibit No. 449 was marked for
21 identification.)

22 Q. (BY MR. STOCK) Identify Exhibit 449, please.

23 A. Exhibit 449 is an e-mail from Ed Abbasi dated
24 November 1, 2001, to me.

25 Q. And what is it regarding?

1 criteria.

2 Rod Thompson, our hydrogeologist in the Water
3 Quality Program, had a differing opinion, and we
4 determined that we needed more information before we
5 could say -- more information from the Port before we
6 could say that the fill criteria were not appropriate
7 to apply to processed materials.

8 There are certain grades of gravel which are
9 going to be very, very uniform in their nature. Some
10 topsoils might come from various sources and there is a
11 lot of variability in the quality of the topsoil, so we
12 asked the Port to give us an idea of the volume of
13 material that would be imported as processed material
14 and where it would be placed, under what circumstance,
15 you know, how, where, when, why it would be placed, so
16 we have not approved or made any final decisions as to
17 whether or not the fill criteria should apply to these
18 materials.

19 Q. What's the time line on that?

20 A. It's ongoing. We had a meeting to discuss it
21 a little further and it got canceled and we're trying
22 to reschedule that.

23 Q. Turn to Page 19 of the 401 Certification,
24 please. The 401 Certification requires the Port to
25 submit a surface water and groundwater monitoring plan;

1 A. It's regarding Ed's preliminary conclusions
2 regarding information forwarded to us by the Port for
3 review concerning criteria for processed materials to
4 be used at the Port -- or at the third runway site.

5 Q. Why is the issue being raised as to whether
6 the fill criteria in the 401 Certification apply to
7 topsoil?

8 A. It's being raised to clarify exactly what
9 type of material being used for the Third Runway
10 Project the fill criteria apply to, given that there is
11 a variety of fill being used for different purposes in
12 construction of the facilities that relate to this
13 project.

14 Q. What's the status of Ecology's review of the
15 Port's proposal to not apply the fill criteria to
16 topsoil and other processed material?

17 A. We met with the Port subsequent to this
18 e-mail discussion, in fact, Mr. Abbasi's e-mail
19 references a meeting -- well, yeah, we had a meeting
20 subsequent to that, I can't remember the exact time,
21 where we went out and we went through the issue with
22 the Port. And basically we did not accept their
23 proposal at that point because Ed had certain opinions
24 on the suitability of the fill -- of these processed
25 materials and the necessity for requiring the fill

1 is that right?

2 A. That's correct.

3 Q. Is that surface water and groundwater
4 monitoring plan needed for reasonable assurance under
5 the 401 Certification?

6 A. Yes.

7 MR. STOCK: And let's mark this as the next
8 exhibit.

9 (Deposition Exhibit No. 450 was marked for
10 identification.)

11 Q. (BY MR. STOCK) You've been handed Exhibit
12 450, Ms. Kenny. Identify it for the record, please.

13 A. This is an e-mail from me to Jeannie
14 Summerhays with an attached request for review.

15 Q. A review of what and by who?

16 A. Okay, this is a request for review by
17 Ching-Pi Wang, and he is in the Toxics Cleanup Program.
18 I am requesting through my supervisor to Ching-Pi's
19 supervisor, Steve Alexander, that Ching-Pi provide the
20 Third Runway Project review team with assistance in
21 reviewing the Port's third runway embankment seepage
22 and groundwater monitoring plan submitted by the Port
23 of Seattle on November 16th, 2001.

24 Q. What's the status of that review?

25 A. Ching-Pi has completed his review. The

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29 (Pages 301 to 304)

1 results of that review were forwarded to Rod Thompson
2 in the Water Quality Program. Rod is reviewing
3 Ching-Pi's comments and the report itself and so we are
4 still underway and that process is still ongoing to
5 determine the suitability of that.

6 Q. Have you had any conversations with Mr. Wang
7 or Mr. Thompson regarding the suitability of the Port's
8 seepage and groundwater monitoring plan?

9 A. Yes, I have.

10 Q. And what have they said in that regard?

11 A. Mr. Wang issued a memo to me, which hopefully
12 you'll get this week, it's in the most recent set of
13 public disclosure documents, with some recommendations
14 for how that monitoring plan could be improved.

15 Q. And do you plan on getting a similar memo
16 from Mr. Thompson?

17 A. Yes.

18 Q. Do you know when that's going to happen?

19 A. I talked to him about a week ago, maybe two
20 weeks ago, and he's still working on it. His intent is
21 to set up a site visit where he is going to review the
22 location for the proposed monitoring wells that they
23 have proposed under this plan and do some actual field
24 work to assess the validity of those proposed wells.

25 Q. So is your plan similar to what you're going

1 to do under the review of the revised Low Flow Plan
2 where you're going to take Mr. Wang's memo and
3 Mr. Thompson's memo and prepare a letter to the Port
4 telling the Port what revisions need to be made in this
5 seepage and groundwater monitoring plan?

6 A. That's correct.

7 Q. And then the plan is for the Port to make
8 those revisions, and that will be submitted back to
9 Ecology for their review and at some point Ecology will
10 provide written approval under the 401 Certification;
11 is that right?

12 MR. REAVIS: Objection to the extent it calls
13 for speculation.

14 A. We will direct the Port as to what they need
15 to do to satisfy our concerns, they will submit a
16 submittal back to us, and when we have determined that
17 that submittal is adequate we will submit written
18 approval, but only when we've made the determination
19 that it's adequate.

20 Q. (BY MR. STOCK) Have you had any
21 conversations with Beth Clark concerning the
22 implementation of the fill criteria in the 401
23 Certification since September 21 --

24 A. Yes.

25 Q. -- 2001? And what have those conversations

1 been regarding?

2 A. There was the one meeting that we held or we
3 had out at the Port's West Side office where Beth Clark
4 and Paul Agid and Robin Kordik, myself, Ed Abbasi and
5 Rod Thompson discussed the fill criteria.

6 Q. For what reason?

7 A. To determine which projects the criteria
8 apply to.

9 Q. Oh, the Miller Creek development and the
10 154th Street?

11 A. And the other Master Plan update improvement
12 projects.

13 Q. How about Lynn Gould, have you had any
14 discussion with Lynn Gould about the implementation of
15 the fill criteria in the 401 Certification?

16 A. No.

17 Q. Have you had any discussions with Paul Agid
18 concerning implementation of the fill criteria in the
19 401 Certification?

20 A. Yes.

21 Q. When?

22 A. At that same meeting.

23 Q. Other than that meeting, any other meetings
24 or discussions with Paul Agid concerning the
25 implementation of the fill criteria?

1 A. No.

2 Q. Does the 401 Certification require compliance
3 with the May 1999 agreed order?

4 A. No.

5 Q. How does the certification address the
6 requirements of the water quality regulations regarding
7 activities that generate nonpoint source pollution?

8 A. Could you repeat the question again, please.

9 Q. Sure.

10 MR. STOCK: Can you read it back.
11 (The reporter read back as requested.)

12 A. Could you define what you mean by nonpoint
13 source pollution?

14 Q. (BY MR. STOCK) What is your understanding of
15 what nonpoint source pollution is as that term is used
16 in water quality regulations?

17 A. There are certain facilities and activities
18 where you generate a pollutant that has a specific
19 outfall where you can regulate the effluent that
20 discharges from that outfall. There are other
21 activities that have no specific discharge point.

22 Q. And given that understanding of nonpoint
23 source pollution, how does Ecology address activities
24 that generate nonpoint source pollution in the 401
25 Certification?

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1 MR. REAVIS: Object to the extent the
 2 document speaks for itself and the question is vague.
 3 MR. STOCK: What's vague about it?
 4 MR. REAVIS: Well, regulating nonpoint source
 5 could mean a number of things. That's a very broad
 6 question.
 7 Q. (BY MR. STOCK) You can go ahead and answer
 8 the question.
 9 A. That's a very broad question, but one thing
 10 that we've done is approve a Comprehensive Stormwater
 11 Management Program that collects water from virtually
 12 the entire airport and routes it through stormwater
 13 ponds that are designed to provide certain levels of
 14 treatment for sedimentation and other constituents such
 15 that sediment that might be generated by cars driving
 16 around or -- I believe all of the runoff -- I believe
 17 the runoff from the runway surfaces is being routed to
 18 the -- maybe I'm wrong on that, but there is the
 19 Comprehensive Stormwater Management Plan, there are
 20 BMPs that are required under the Port's NPDES permit
 21 for their industrial stormwater permit that attach to
 22 temporary construction activities, so the placement of
 23 construction sediment fencing and basic erosion control
 24 management issues are addressed.
 25 There is monitoring required for the

1 stormwater effluent. Vehicle track-out, if they are
 2 construction vehicles, they need to be cleaned of mud
 3 and rock and other material before entering paved
 4 public highways so that sediment isn't tracked onto the
 5 highway.
 6 Q. Is runoff from the embankment a nonpoint
 7 pollution source?
 8 A. It might be a potential sort of pollution.
 9 Q. What does 401 Certification require with
 10 respect to managing that potential nonpoint source of
 11 pollution?
 12 A. Well, the first mechanism is the preventive
 13 mechanism to prevent contaminants from entering the
 14 fill by application of the fill criteria. The second
 15 mechanism is the requirement in Section E for the Port
 16 to develop this embankment seepage flow monitoring
 17 plan. So there will be testing procedures that will
 18 sample the water -- there will be sampling procedures
 19 where they can test the water for constituents of
 20 concern and a protocol for determining whether or not
 21 there is actually a violation of the water quality
 22 standards. And we have -- so we've required
 23 monitoring, the development of a monitoring protocol,
 24 and we have retained the ability to revise our fill
 25 criteria if that monitoring is showing a problem,

1 exceedance of the water quality criteria, and to
 2 require corrective action such as treatment of the
 3 water before it's discharged to surface waters.
 4 MR. STOCK: Let's mark this as the next
 5 exhibit.
 6 (Deposition Exhibit No. 451 was marked for
 7 identification.)
 8 Q. (BY MR. STOCK) You've been handed Exhibit
 9 451. Please identify it.
 10 A. This is a fax sent to me on August 3rd, 2001,
 11 by the King County reviewer. It says KCR. That would
 12 be Kelly Whiting.
 13 Q. Is that Kelly Whiting's handwriting, if you
 14 know, on the fax label?
 15 A. I'm not sure.
 16 Q. Whose handwriting is in the left-hand margin,
 17 if you know?
 18 A. Actually, I don't know. It's not my
 19 handwriting.
 20 Q. Is that your handwriting in the right-hand
 21 margin where it says "keep"?
 22 A. I don't believe any of this is my
 23 handwriting.
 24 Q. What did you do with this memo when you
 25 received it from Mr. Whiting on August 3, 2001?

1 A. I probably distributed it to either Kevin
 2 Fitzpatrick or John Drabek or perhaps both since it was
 3 referring to the Stormwater Management Plan.
 4 Q. Did you send this language to Mr. Whiting for
 5 his review?
 6 A. I believe this language was generated by
 7 Mr. Whiting in response to one of the e-mails that I
 8 sent out containing a draft 401 Certification.
 9 Q. Is this Mr. Whiting's response to your July
 10 29 e-mail which is Exhibit 446 where you sent a draft
 11 of the 401 Certification?
 12 A. I can't say for sure without checking my own
 13 e-mail records because I sent out several e-mails with
 14 ongoing revisions to the 401 as I made them.
 15 Q. So I understand, are you saying that this is
 16 Kelly Whiting's response to your sending him some draft
 17 of the 401 Certification?
 18 A. I believe so.
 19 Q. I see you're looking at the second page. The
 20 first underlined text where it says CSMP could easily
 21 be challenged -- it's on the second page.
 22 A. I know. I'm just looking at what precedes
 23 that particular sentence.
 24 Q. On the second page where it states CSMP could
 25 easily be challenged as not being AKART, SWDM is not

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31 (Pages 309 to 312)

1 AKART, is that what Kelly Whiting wrote to you?
 2 MR. REAVIS: Objection, lack of foundation.
 3 A. Well, I believe Kelly wrote this sentence
 4 that is underlined that you are referring to.
 5 Q. (BY MR. STOCK) And what do you understand
 6 him to mean when he says CSMP could easily be
 7 challenged as not being AKART, SWDM is not AKART?
 8 A. AKART is a term that means all known and
 9 reasonable treatment something or other, maybe that's
 10 it. This is a term that's used in engineering and in
 11 regulatory circles, water quality circles. It has a
 12 specific standard to it.
 13 Q. So what is your understanding when he means
 14 the Comprehensive Stormwater Management Plan could
 15 easily be challenged as not being AKART?
 16 A. I believe that speaks for itself.
 17 Q. You understand he's telling you that the King
 18 County Surface Water Design Manual is not AKART; is
 19 that correct?
 20 A. That's what it says, SWDM is not AKART.
 21 Q. And you understood that to be the King County
 22 Surface Water Design Manual, correct?
 23 A. That's what I understood.
 24 Q. Did that give you any concern that the
 25 individual who was reviewing the Comprehensive

1 Stormwater Plan for the Department of Ecology in
 2 accordance with the King County Surface Water Design
 3 Manual was telling you that the manual is not AKART?
 4 A. No.
 5 Q. Why not?
 6 A. Because of the way we've designed the 401 and
 7 how the 401 works in tandem with the 402 issued to the
 8 Port. We require monitoring for water quality purposes
 9 and we have established a baseline which we believe
 10 does protect water quality and will allow the Port to
 11 protect water quality. Through the monitoring that
 12 we've required we can verify whether the BMPs that are
 13 called for in the Comprehensive Stormwater Management
 14 Plan are being effective, and if they are not being
 15 effective, then we have the ability to require further
 16 treatment.
 17 Q. So is Ecology relying upon future compliance
 18 of future NPDES permits to have reasonable assurance
 19 that this project isn't going to violate state water
 20 quality standards?
 21 A. Yes and no. The yes part is that the
 22 baseline -- we have established a baseline with the
 23 Stormwater Management Plan that we believe is
 24 protective of water quality. But once those facilities
 25 are up and operating they are covered under the Port's

1 industrial stormwater permit, and that permit is where
 2 the monitoring and the adaptive management will be
 3 applied, if necessary. Now, where I get reasonable
 4 assurance is that I, in my certification, specifically
 5 prohibited any discharge of operational stormwater
 6 coming from the third runway improvements until a site
 7 specific study has been done and approved by Ecology
 8 that will establish appropriate effluent limits in the
 9 NPDES permit.
 10 Q. Where is that required under the 401
 11 Certification? Look at page 27.
 12 A. Thank you. I don't have my tabbed version
 13 with me here.
 14 Yes, it's identified on Page 27, No. 2,
 15 Subsection a). No stormwater generated by operation of
 16 new pollution generating impervious surfaces of
 17 projects for which the Section 404 permit was sought
 18 shall be discharged to state receiving waters until a
 19 site specific study, e.g., a Water Effects Ratio Study,
 20 has been completed and approved by Ecology and
 21 appropriate limitations and monitoring requirements
 22 have been established in the Port's NPDES permit.
 23 Q. What is the purpose of this Water Effects
 24 Ratio Study?
 25 A. As I understand it, it is a very technical

1 study that looks at stormwater discharges being
 2 produced by the airport facilities and the effects of
 3 those stormwaters on the receiving waters to which that
 4 stormwater is discharged.
 5 Q. Is the Port undertaking a Water Effects Ratio
 6 Study?
 7 A. They are undertaking a site specific study.
 8 As I understand it, a Water Effects Ratio Study refers
 9 to a specific type of study, but our staff have already
 10 met several times with the Port to determine what this
 11 site specific study will include.
 12 Q. Who from Ecology?
 13 A. The prime -- there are two people at
 14 headquarters who are doing it, and then Ed Abbasi is
 15 the lead in the region.
 16 Q. Who at headquarters?
 17 A. I can't recall their names right now.
 18 Q. And who have they met with at the Port and
 19 when?
 20 A. I don't know. I haven't been involved in
 21 those meetings. I think they are working with Scott
 22 Tobiason and perhaps Keith Smith.
 23 Q. Does Ecology need a site specific study under
 24 Condition J(2)(a) of the 401 Certification in order to
 25 have reasonable assurance?

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32 (Pages 313 to 316)

1 A. Yes.

2 Q. I'm sorry, I'm just not getting this. Tell
3 me what this site specific study is supposed to
4 accomplish.

5 A. There are allegations right now from various
6 parties that the Port is not in compliance with the
7 terms and conditions of their existing industrial
8 stormwater permit, and that is very difficult to
9 determine, as I understand it, because there are no
10 specific effluent limitations established in that
11 permit. You can't establish effluent limits, as I
12 understand it, until you do a site specific study, so
13 this condition is an attempt to get those effluent
14 limits established so that we know whether the Port is
15 in compliance with their NPDES permit or not.

16 Q. How does a site specific study determine the
17 effluent limits?

18 A. You would have to ask that specifically of
19 the Water Quality Program. That's not an area where I
20 have specific expertise, but my understanding is that
21 it looks at the type of stormwater being generated at
22 the airport, looks at the chemical composition of that,
23 the perhaps the volume of that stormwater, and then it
24 looks at the receiving water. So it looks at things
25 like the alkalinity of the water, the buffering

1 capacity. Say the stormwater has high pH, and if it's
2 of low alkalinity it would neutralize the pH coming
3 from the stormwater, so it's a very interactive,
4 dynamic, complex modeling situation.

5 Q. And why does Ecology need the site specific
6 study under this condition of the 401 Certification to
7 have reasonable assurance?

8 A. We put this in there to address concerns
9 raised by various of the airport community's
10 consultants that there were possibly high metal
11 concentrations in the stormwater that were in violation
12 of the Port's NPDES permit, and so that when there is
13 discharge from the new pollution generating impervious
14 surfaces that will involve the Third Runway Project we
15 can be assured that effluent limits have been
16 established that would address metal contaminants and
17 then those waste or those contaminants would be
18 appropriately regulated by the NPDES permit.

19 Q. Have you had any dealings with Dr. William
20 Stubblefield?

21 A. I have never heard of him.

22 Q. He's one of the Port's paid experts in this
23 case.

24 A. No.

25 Q. Have you seen any draft data spreadsheet

1 printouts containing in-stream data?

2 A. I haven't seen any of that. That work is
3 being overseen by Ed Abbasi, so I couldn't answer that
4 question.

5 Q. What have you heard about it?

6 A. I've heard from Ed that he's meeting with the
7 Port, he is consulting with our experts at
8 headquarters, they have had one or two site visits, and
9 they are moving forward trying to define exactly what
10 will be a part of this site specific study.

11 MR. STOCK: Let's take a break.

12 THE WITNESS: I'm ready for a break.

13 (Recess taken.)

14 Q. (BY MR. STOCK) With respect to this site
15 specific study, do you understand that to be something
16 that Ecology is asking the Port to prepare and that
17 Ecology will ultimately review and approve that
18 report --

19 A. Yes.

20 Q. -- under the 401 Certification?

21 A. The Condition J(2)(a) says the study may use
22 existing impervious surfaces, et cetera, and it shall
23 be submitted to Ecology for review and written
24 approval.

25 Q. And the "it" is the report on the site

1 specific study?

2 A. Yes.

3 Q. When is this report supposed to be submitted
4 to Ecology, is there any time line?

5 A. I'm not aware that they have set a specific
6 time line.

7 Q. Are you aware of whether there is a draft
8 report?

9 A. I don't believe there is a draft because they
10 are still, from what Ed told me, they are still working
11 out the modeling that they will use for the study.

12 Q. What involvement will you have in a review of
13 this report relating to the site specific study?

14 A. I will not be involved in reviewing the
15 technical aspects of that study. I will simply be kept
16 apprised of the progress and ultimately the final
17 inclusion of the results of that study into a revised
18 NPDES permit.

19 Q. Will you get a copy of the report?

20 A. I believe I will.

21 Q. And will you review that report?

22 A. I will certainly look at it, but I'm not
23 qualified to provide any technical review of the
24 report. I'm relying on the Water Quality Program to
25 provide that.

AR 028796

1 Q. Will you as the Federal Permit Manager for
 2 the Sea-Tac Third Runway be the individual sending the
 3 letter for written approval of the report?
 4 A. No.
 5 Q. Who will be?
 6 A. **The written approval of that report or study**
 7 **would come to the Port's NPDES permit manager, who is**
 8 **Ed Abbasi.**
 9 Q. And you're not aware of what the time line is
 10 for issuance of this report?
 11 A. No.
 12 Q. Mr. Abbasi works in the Bellevue office?
 13 A. **He does.**
 14 Q. Turn to Page 28 of the 401 Certification,
 15 please, under Condition J(2)(f), does the certification
 16 require the Port to submit a Stormwater Facilities
 17 Operations and Maintenance Plan?
 18 A. Yes.
 19 Q. Has the Port submitted that Stormwater
 20 Facilities Operation and Maintenance Plan to Ecology?
 21 A. No.
 22 Q. What is the status of that deliverable?
 23 A. **We've essentially deferred that deliverable**
 24 **until we're closer to final design on those facilities.**
 25 Q. And is this Stormwater Facilities Operation

1 and Maintenance Plan that the Port must submit subject
 2 to Ecology review?
 3 A. **We have required that it be submitted for**
 4 **review and written approval.**
 5 Q. And does Ecology need this Stormwater
 6 Facilities Operation and Maintenance Plan for
 7 reasonable assurance?
 8 A. Yes.
 9 Q. Does the 401 Certification set limitations on
 10 turbidity?
 11 A. **Section K of the certification on Page 28**
 12 **lays out some provisions regarding turbidity, that's**
 13 **K(3)(a). Let's see, that's monitoring, actually.**
 14 **Well, what we required in K(2) is that**
 15 **stormwater discharges shall not cause a visible change**
 16 **in turbidity, so the standard is a visual check. And**
 17 **they do that, also, so we've also required monitoring**
 18 **by use of a portable turbidimeter and grab samples.**
 19 **(Discussion off the record.)**
 20 Q. (BY MR. STOCK) I want to go back to this
 21 fill acceptance criteria just for a second so I make
 22 sure I understand what you're saying. If you'll refer
 23 again to Page 18 of the 401 Certification, at the very
 24 bottom where it says Prohibited Fill Sources, it is
 25 Ecology's position that if the fill source is

1 determined to be contaminated following a Phase I or
 2 Phase II site assessment, that even if the fill source
 3 passes an SPLP procedure, the 401 Certification still
 4 bars the Port from using that fill source?
 5 A. Yes.
 6 Q. What language is Ecology relying upon for
 7 that position?
 8 A. **It's Condition E(1)(d), Prohibited Fill**
 9 **Sources.**
 10 Q. What was the last time that you had a
 11 conversation with Kevin Fitzpatrick concerning how the
 12 fill criteria conditions in the 401 Certification are
 13 to be applied?
 14 A. **I haven't spoken with him in a very long time**
 15 **about that.**
 16 Q. Have you had any discussions with Ray Hellwig
 17 about that?
 18 A. No.
 19 Q. How about Gordon White?
 20 A. No.
 21 MR. STOCK: I don't have any further
 22 questions.
 23 (Deposition concluded at 4:25 p.m.)
 24 (Signature reserved.)
 25

1 CORRECTION & SIGNATURE PAGE
 2
 3 RE: ACC vs. STATE OF WASHINGTON, ET AL
 4 PCHB No. 01-160
 5 ANN E. KENNY; TAKEN FEBRUARY 20, 2002
 6
 7 I, ANN E. KENNY, have read the
 8 within transcript taken FEBRUARY 20, 2002, and the same
 9 is true and accurate except for any changes and/or
 10 corrections, if any, as follows:
 11 PAGE LINE CORRECTION
 12
 13
 14
 15
 16
 17
 18
 19
 20
 21 Signed at , Washington,
 22 on the day of , 2002.
 23
 24 ANN E. KENNY
 25

AR 028797

REPORTER'S CERTIFICATE

1
2
3 I, KATHY HAUCK, the undersigned Certified Court
4 Reporter and Notary Public, do hereby certify:
5 That the testimony and/or proceedings, a transcript
6 of which is attached, was given before me at the time
7 and place stated therein; that any and/or all
8 witness(es) were by me duly sworn to tell the truth;
9 that the sworn testimony and/or proceedings were by me
10 stenographically recorded and transcribed under my
11 supervision, to the best of my ability; that the
12 foregoing transcript contains a full, true, and
13 accurate record of all the sworn testimony and/or
14 proceedings given and occurring at the time and place
15 stated in the transcript; that I am in no way related
16 to any party to the matter, nor to any counsel, nor do
17 I have any financial interest in the event of the
18 cause.
19 WITNESS MY HAND AND SEAL this day of
20 , 2002.
21
22 KATHY HAUCK, HA-UC-KK-L4210H
23 Notary Public in and for the State
24 of Washington, residing in King
25 County. Commission expires March 6, 2006.

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A				
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