

**KMET, PETER**

**AR 028816.01**

**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:** Peter Kmet, P.E., Senior Environmental Engineer, Toxics Cleanup Program, DOE Headquarters Policy and Technical Support Unit.

**Date of Deposition:** December 19, 2001

**1. Admissibility**

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

Testimony about recommendations and reservations expressed by the Senior Environmental Engineer in Ecology's Toxics Cleanup Program, Headquarters Policy and Technical Support Unit regarding 401 fill conditions.

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

Fill Criteria, Condition E of the Certification (pp. 14-19).

**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 Kmet deposition are offered by ACC and CASE:

Page 7, lines 4-17

Page 11, lines 2-23

Page 13, line 11 through Page 27, line 15

Page 28, line 20 through Page 43, line 6

**3. Counter Excerpts of Respondents:** See attached.

**4. Objections of Respondents:** See attached.

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

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

Deponent: **Pete Kmet**

Date of Deposition: **December 19, 2001**

**3. Counter Excerpts by Respondent Department of Ecology:<sup>1</sup>**

<u>START</u>	<u>END</u>
Page 6, line 2	page 6, line 5
Page 6, line 11	page 6, line 13
Page 47, line 21	page 48, line 9

**4. Objections to Designations by Appellants:**

**General objection:** Mr. Kmet is *not* a CR 30(b)(6) designated witness and does not speak for the Department of Ecology on its 401 certification to the Port of Seattle. In response to a subpoena naming a governmental agency:

[T]he *organization so named* shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters known on which he will testify.

CR 30(b)(6) (emphasis added).

*Ecology* did not designate Mr. Kmet as a 30(b)(6) witness.

By Order dated March 19, 2002, the Board has conditionally granted ACC's motion to publish. In response to ACC's motion, Ecology argued that it did not designate witnesses pursuant to CR 30(b)(6) because ACC's request for designation was overbroad and improper. The Board's order apparently rejects Ecology's argument on the basis that by relying on the work of Ann Kenny, Erik Stockdale, John Drabek, and Kevin Fitzpatrick to grant the Port's 401 certification Ecology has *implicitly* designated those individuals as CR 30(b)(6) witnesses. However, this logic does not hold true for Mr. Kmet.

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<sup>1</sup> 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.

Although Mr. Kmet provided comments to Ecology employees working on the Port's 401 application, Ecology did not rely on his work to grant the 401. As Mr. White testified to this Board, he did not rely on Mr. Kmet to reach his decision.<sup>2</sup> Similarly, in response to an ACC question about how to read the 401 certification, Mr. Kmet stated in his deposition "I think that's up to the person preparing the certification and what was their intent." Deposition of Peter Kmet, p. 43, ll. 1-6.

Mr. Kmet's own documents demonstrate he gave mere "recommendations" regarding acceptable fill criteria. Hearing Ex. 36 (June 27, 2001 e-mail from Peter Kmet to Kevin Fitzpatrick). In his declaration to this Board, Mr. Kmet stated that his June 27, 2001 message "should not be construed to conclude that the acceptable fill criteria established in the § 401 Certification are or are not protective of water quality." Declaration of Pete Kmet, p. 2, ll. 3-4. In response to the final question in his deposition, Mr. Kmet confirms that his comments do not address water quality.<sup>3</sup>

Therefore, Ecology objects under CR 30(b)(6) and on relevance grounds to publishing Mr. Kmet's deposition transcript for the purpose of ACC arguing that Mr. Kmet's recommendations regarding acceptable fill reflect Ecology policy. Ecology's acceptable fill policy for the Port's Third Runway Project is reflected in its 401 Certification.

In addition to its general objection, Ecology objects to particular portions of Mr. Kmet's deposition transcript as follows.

<u>START</u>	<u>END</u>	<u>OBJECTION</u>
Page 16, line 4	page 16, line 7	Mischaracterizes witness' testimony (re "you reached the opinion the sampling frequency was insufficient.")
Page 20, line 5	page 20, line 21	Relevance. No foundation. Under WAC 173-340-900 Ecology has set the MTCA Method A Soil Cleanup Levels for Unrestricted Land Uses. In Table 740-1 of that rule the Cleanup Level for Arsenic is 20 mg/kg. According to footnote "b", that level is "adjusted for natural background for soil." The rule was recently amended effective February 12, 2001.
Page 26, line 14	Page 26, line 23	Relevance. No 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.

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<sup>2</sup> Although Mr. White has testified in this matter Ecology does not yet have access to the hearing transcript and, therefore, cannot yet provide the Board with a precise cite to Mr. White's testimony in this regard.

<sup>3</sup> Deposition of Peter Kmet, p. 48, ll. 8-9 - "My e-mail is not addressing WAC 173-201A-040." WAC 173-201A-040 is Ecology's water quality regulation.

**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:** Peter Kmet, P.E., Senior Environmental Engineer, Toxics Cleanup Program, DOE Headquarters Policy and Technical Support Unit.

**Date of Deposition:** December 19, 2001

**Responses to Ecology Objections:**

For the publication of the deposition of Mr. Kmet, Ecology raises a general objection, and three specific objections that are each addressed below.

**1. Response to General Objection:**

In granting the Motion to Publish, the Board has already rejected Ecology's argument that it did not designate Mr. Kmet as a CR 30(b)(6) witness. Mr. Kmet is a Senior Environmental Engineer in the Toxics Cleanup Programs' Policy and Technical Support Unit. He clearly can testify regarding the Department's policy regarding hazardous substances and the Model Toxics Control Act, Ch. 107D RCW ("MTCA").

Ecology's suggestion that Mr. Kmet's deposition is irrelevant factually lacks merit. Chung Yee, the Department person assigned to review the fill criteria, was specifically directed to provide a "response to comments and concerns raised by Pete Kmet." Ex. 21. To the extent that Ecology has argued that it relied upon its technical experts, the matters its technical experts were asked to address are directly relevant.

**2. Objection:** Page 16, line 4 through Page 16, line 7

**Response:** This question was in regard to Exhibit 31, a September 11, 2000, email from Mr. Kmet to Mr. Fitzpatrick. Exhibit 31 is identical to exhibit 15, which was discussed during the cross examination of Chung Yee. In the third page of the attachment to the September 11 email, Mr. Kmet states, with regard to the proposed fill criteria sampling schedule "this sampling schedule is insufficient to determine compliance with the MTCA standards." Accordingly, the question starting on page 16, line 4 directly quotes Mr. Kmet's testimony and Ecology's objection here should be overruled.

**3. Objection:** Page 20, line 5 through Page 20 line 21

**Response:** The relevance objection here is unfounded because the protectiveness of the fill criterion for arsenic is directly at issue in this case. Mr. Kmet

states in his answer that when the MTCA method A standard of 20 was adopted in 1991, Ecology “believed 20 was natural background for arsenic.” However, Mr. Kmet explained that, “since then we’ve done sampling throughout the state and learned that in Western Washington, background is more in the order of 7 to 8 parts per million or milligrams per kilogram.” The foundation for this question was established on page 19, line 6 of the deposition when Mr. Kmet identified Exhibit 32, which Mr. Kmet identified as the concern he raised regarding the proposed arsenic limit: “20 is too high and it should be set at background. Background in Western Washington is 7 to 8.”

Ecology also attempts to argue in this objection that natural background for arsenic is 20mg/kg based on a footnote to table 740-1, which was amended in February 12, 2001. This argument is disingenuous and expressly contradicted by the testimony of all other witnesses in this case. In particular Department of Ecology Publication #94-115 – Natural Background Soil Metals Concentrations in Washington State, which was offered as Exhibit No. 1063 by Ecology, identifies Puget Sound Natural Background for Arsenic to be 7 mg/kg. .

**4. Objection:** Page 26, line 14 through Page 26 line 23

**Response:** Again, there is no basis for a relevancy objection here because the issue of whether MTCA based standards are sufficient to protect water quality is directly at issue in this case. In particular, MTCA method A sets limits for gasoline, diesel and heavy oil, which are all allowed under the numeric criteria in the 401, but which Ecology’s Kevin Fitzpatrick testified was a “mistake.”

The foundation for this question was established on page 25, line 14 of the deposition where a portion of exhibit 35 was read to Mr. Kmet, which stated “Mr. Kmet recommended that MTCA should not be used for the establishment of clean fill criteria for the Seattle-Tacoma International Airport third runway project” and Mr. Kmet was asked, “do you think this is an accurate characterization of a conversation you had?” Mr. Kmet responded “yeah.” Page 26, Line 1. Accordingly, a proper foundation was established for the question regarding Mr. Kmet’s conceptual objection to the use of MTCA to establish fill criteria for third runway project.

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**DEPOSITION UPON ORAL EXAMINATION OF**

**PETER KMET, P.E.**

**DECEMBER 19, 2001**

**ACC V. STATE OF WASHINGTON, ET AL.**

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AR 028822

JAN 02 2002

1 POLLUTION CONTROL HEARINGS BOARD  
 2 FOR THE STATE OF WASHINGTON  
 3  
 4 AIRPORT COMMUNITIES COALITION,)  
 5 Appellant, )  
 6 vs. ) PCHB No. 01-160  
 7 STATE OF WASHINGTON, )  
 8 DEPARTMENT OF ECOLOGY; and )  
 9 THE PORT OF SEATTLE, )  
 10 Respondents. )  
 11  
 12 DEPOSITION UPON ORAL EXAMINATION  
 13 OF  
 14 PETER KMET, P.E.  
 15  
 16 1:12 P.M.  
 17 DECEMBER 19, 2001  
 18 2425 BRISTOL COURT SW  
 19 SECOND FLOOR  
 20 OLYMPIA, WASHINGTON  
 21  
 22  
 23  
 24  
 25 CARLA R. WALLAT, CRR, RPR, CCR #WALLACR346BE

1

1 I N D E X  
 2 EXAMINATION BY: PAGE(S)  
 3 MR. WITEK 4  
 4  
 5 EXHIBITS FOR IDENTIFICATION PAGE  
 6 30 8/24/2000, 5:16 PM e-mail from Yee to 11  
 7 Fitzpatrick  
 8 31 9/11/2000, 11:15 AM e-mail from Kmet 13  
 9 to Fitzpatrick  
 10 32 9/11/2000, 3:32 PM e-mail from Yee to 19  
 11 Fitzpatrick  
 12 33 9/11/2000, 3:44 PM e-mail from Kmet to 21  
 13 Yee  
 14 34 6/7/2001, 4:10 PM e-mail from Thompson 24  
 15 to Kmet, Yee  
 16 35 6/13/2001, 8:42 AM e-mail from Yee to 25  
 17 Fitzpatrick  
 18 36 6/27/2001, 4:01 PM e-mail from Kmet to 28  
 19 Fitzpatrick  
 20 37 Guidance for the use of Tables: PQLS, 36  
 21 MDLS, and PQL Comparisons to Method B  
 22 Cleanup Levels  
 23 38 MTCA Cleanup Regulations; WAC 43  
 24 173-340-740; February 12, 2001  
 25 39 Chapter 173-201A WAC; 11/18/97 46

1 A P P E A R A N C E S  
 2  
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 20 Marten Brown  
 21 421 South Capitol Way, Suite 303  
 22 Olympia, Washington 98501  
 23  
 24 ALSO PRESENT: GREG WINGARD  
 25

2

1 OLYMPIA, WASHINGTON; DECEMBER 19, 2001  
 2 1:12 P.M.  
 3 --oOo--  
 4  
 5 PETER KMET, P.E.,  
 6 sworn as a witness by the Notary  
 7 Public, testified as follows:  
 8  
 9 EXAMINATION  
 10  
 11 BY MR. WITEK:  
 12 Q. Good afternoon. My name is Mike Witek. I'm  
 13 one of the attorneys for the Airport Communities  
 14 Coalition and I'm going to ask you some questions today  
 15 about the 401 Certification that the Airport  
 16 Communities Coalition is appealing and the fill  
 17 criteria. If you don't understand a question that I  
 18 put to you, please let me know and I'll try to rephrase  
 19 it. And you need to respond verbally so that your  
 20 answers can be recorded by the court reporter.  
 21 Do you understand those instructions?  
 22 A. Yes.  
 23 Q. Are you Peter Kmet?  
 24 A. Yes, I am.  
 25 Q. Thank you.

AR 028823



1 Have you ever had your deposition taken  
 2 before?  
 3 A. Yes, I have.  
 4 Q. Approximately how many times?  
 5 A. At least -- at least three times.  
 6 Q. Do you remember what types of cases they  
 7 were?  
 8 A. Once -- at least once in Wisconsin when I  
 9 worked for the Wisconsin DNR there. It had to do with  
 10 a landfill. Here in Washington, I was deposed  
 11 regarding the Well 12A Superfund site in Tacoma.  
 12 Alexander Farms site.  
 13 Q. Can you tell me a little bit more about the  
 14 Alexander Farms site?  
 15 A. It's a site with pesticide contamination in  
 16 central Washington.  
 17 Q. And was that a MTCA cleanup action case or --  
 18 A. How should I put it? It's a case where  
 19 the -- they dumped pesticide on the ground and spilled  
 20 it and contaminated the ground and the groundwater and  
 21 they were appealing their status as a potentially  
 22 liable person.  
 23 Q. How long ago did you give your deposition in  
 24 that case?  
 25 A. Within the last few months. I can't remember

5

1 Q. Have you had any conversations with Mr. Yee  
 2 since Monday?  
 3 A. Not that I remember, no.  
 4 Q. Can you tell me what your responsibilities  
 5 are at the Department of Ecology?  
 6 A. Well, I work on a variety of things. I'm in  
 7 what's called the policy and technical support unit  
 8 within the headquarters part of our program. In that  
 9 capacity I do a variety of things including writing  
 10 regulations, preparing guidance and policy documents to  
 11 implement those regulations. I also work on  
 12 legislative issues on behalf of the program, and will  
 13 on occasion provide site specific technical assistance  
 14 to site managers or other employees within ecology.  
 15 Also, of course, answer the phone and provide technical  
 16 assistance to folks that call the agency about cleanup  
 17 related issues.  
 18 Q. So do you sit on committees that work to  
 19 revise regulations and policies that the department  
 20 implements?  
 21 A. Well, we don't currently have any such  
 22 committees now. But in -- leading up to this last  
 23 revision which was adopted earlier this year, there  
 24 were a number of committees that were involved, and,  
 25 yes, I was -- I did participate in those committees.

1 exactly.  
 2 Q. Can you tell me what your current position is  
 3 with the Department of Ecology?  
 4 A. I'm an environmental engineer in the Toxics  
 5 Cleanup Program.  
 6 Q. How long have you been in this position?  
 7 A. Well, I've been an environmental engineer for  
 8 ecology since I joined the agency in 1984. And I've  
 9 worked in the cleanup program as an environmental  
 10 engineer since that time.  
 11 Q. Who do you answer to within the department?  
 12 A. My immediate supervisor is Curtis Dahlgren,  
 13 D-A-H-L-G-R-E-N.  
 14 Q. Other than conversations you may have had  
 15 with your attorney, who within the Department of  
 16 Ecology have you spoken with in preparation for being  
 17 deposed today?  
 18 A. Only just my supervisor letting him know that  
 19 I was being deposed.  
 20 Q. Do you know Chung Yee? **AR 028824**  
 21 A. Yes.  
 22 Q. And are you aware that he gave deposition  
 23 testimony on Monday?  
 24 A. I wasn't aware when. I knew he was going to  
 25 get deposed.

6

1 Q. What laws or regulations were amended?  
 2 A. The cleanup regulation, the MTCA, the Model  
 3 Toxics Control Act cleanup regulation, WAC 173-340.  
 4 Q. Do you know Greg Wingard?  
 5 A. Yes.  
 6 Q. How long have you known Mr. Wingard?  
 7 A. For a long time. I don't remember  
 8 specifically, but for a long time.  
 9 Q. And have you had occasion to speak with him  
 10 in the performance of your duties at the Department of  
 11 Ecology?  
 12 A. Sure.  
 13 Q. And what sorts of conversations have you had  
 14 with Mr. Wingard, generally speaking?  
 15 A. Greg will sometimes call me about a variety  
 16 of issues related to the MTCA Toxics Act.  
 17 Q. Did Mr. Wingard serve on any past committees  
 18 that worked on the development of MTCA policies or  
 19 regulations?  
 20 A. He was involved in this latest rule making.  
 21 You know, I can't remember exactly which committees or  
 22 how active a role, but he did participate, comment on  
 23 the regulation and attend some of the meetings, yes.  
 24 Q. Based on your experience do you think that  
 25 Mr. Wingard is knowledgeable of MTCA and its

8

1 implementing regulations?  
2 MR. KRAY: Objection. I'm not sure that this  
3 witness can qualify Mr. Wingard as an expert.

4 MR. WITEK: He can answer the question.

5 A. Could you repeat the question?

6 MR. WITEK: Could you read the question back,  
7 please?

8 (Reporter read back as requested.)

9 MR. KRAY: Objection, calls for this witness  
10 to testify on a legal conclusion.

11 THE WITNESS: Do I have to respond to that?

12 Q. (BY MR. WITEK) Please answer the question.

13 A. Well, I can't look into Greg's mind. I don't  
14 know him that well to know what his knowledge is. He's  
15 participated in these committees, so obviously he has  
16 some knowledge. How detailed his knowledge is, I don't  
17 know. You'd have to ask him.

18 Q. Are you familiar with the Port's proposed  
19 third runway project?

20 A. Only generally.

21 Q. When did you first become aware of the Port's  
22 proposed third runway project?

23 A. Probably read about it in the newspaper or  
24 saw a news coverage about it, and I don't remember  
25 when, but it's been quite some time.

1 couple years.

2 Q. Can you tell me who within the Department of  
3 Ecology you've discussed fill criteria with?

4 A. Kevin Fitzpatrick and Chung Yee. Probably  
5 others, but those two principally that I can remember.

6 Q. Were you ever asked to do any work on the  
7 development of fill criteria for the third runway  
8 project?

9 A. I was asked to comment on some of the draft  
10 documents that were prepared leading up to the permit.

11 Q. And who asked you to review draft comments?

12 A. Probably Kevin or Chung. I'm not sure.

13 Q. What position does Mr. Fitzpatrick hold in  
14 the department?

15 A. He works in our northwest regional office.  
16 I'm not sure exactly what his position is there.

17 Q. So Mr. Fitzpatrick is not in the toxics  
18 control program?

19 A. The cleanup program? Not that I'm aware of.

20 Q. What position did Mr. Yee hold?

21 A. Chung has moved around several times. I  
22 think he's working now in the headquarters part of  
23 Toxics Cleanup Program in a different unit.

24 (Deposition Exhibit No. 30 was marked for  
25 identification.)

1 Q. Are you aware that the Department of Ecology  
2 has issued a Clean Water Act, Section 401 Certification  
3 for the third runway project?

4 A. Yes.

5 Q. Have you seen the August 10th or September 21  
6 certifications that were issued by the department?

7 A. I've seen one of them. I don't frankly  
8 remember the date on the one that I saw. I don't  
9 remember. I saw a document provided to me by our  
10 Attorney General's office. I don't know which one that  
11 was.

12 Q. Do you remember when it was that you first  
13 discussed fill criteria or inclusion in the 401  
14 Certification?

15 MR. KRAY: Objection, lack of foundation.

16 A. Well, I don't remember a specific date when I  
17 became aware of the permit and had discussions on it.

18 Q. (BY MR. WITEK) Have you had discussions with  
19 other people within the department about the fill  
20 criteria that should be included within the 401  
21 Certification?

22 A. Yes.

23 Q. Can you remember approximately how long ago  
24 that was?

25 A. Not specifically. Probably within the last

1 Q. (BY MR. WITEK) Mr. Kmet, does the document  
2 labeled Exhibit 30 look familiar to you?

3 A. Yes.

4 Q. Can you tell me what this document is?

5 A. This is an e-mail from me to or it looks like  
6 from Chung -- that's a good question. From Chung K.  
7 Yee to me. That can't be right.

8 Q. Take your time.

9 MR. WITEK: Off the record for a second.  
10 (Discussion off the record.)

11 MR. WITEK: Let's go ahead and go back on.

12 A. What's not clear to me, if this is a  
13 document I originated or as being sent to me. It is an  
14 e-mail -- copy of an e-mail to Kevin Fitzpatrick from  
15 Chung K. Yee and it's been sent to me, but I don't know  
16 if I'm the person who's writing on this or not. Let me  
17 look at it a bit more here.

18 No. This is a copy of an e-mail that was  
19 sent to me, a copy.

20 Q. (BY MR. WITEK) Is it your understanding that  
21 the underlined words were additions or comments by  
22 Mr. Yee?

23 A. I'm not sure who originated those, but those  
24 are not my comments.

25 Q. And Mr. Kmet, the date on that e-mail is

1 August 24th, 2000; is that correct?  
 2 A. Yes.  
 3 Q. And do you believe this is your earliest  
 4 e-mail regarding the third runway project?  
 5 A. I'm not sure, but I think this is about the  
 6 time that I started to have a bunch of e-mails back and  
 7 forth regarding the project.  
 8 Q. Thank you.  
 9 (Deposition Exhibit No. 31 was marked for  
 10 identification.)  
 11 Q. (BY MR. WITEK) Mr. Kmet, is Exhibit 31 an  
 12 e-mail from you to Kevin Fitzpatrick dated September  
 13 11th, 2000?  
 14 A. Yes. It's a copy of it, Ann Kenny's copy.  
 15 Q. Is the underlined language on Exhibit 31 your  
 16 comments?  
 17 A. Yes, I believe they are my comments. The  
 18 headers are underlined in the attachment. I don't  
 19 think I created that part of it, but the comments  
 20 within the body are mine. I recognize them.  
 21 MR. KRAY: To clarify the record, are you  
 22 referring to the e-mail or the attachment underlining  
 23 in your question, Mr. Witek?  
 24 MR. WITEK: I was referring to both.  
 25 A. And my response is to include both the e-mail

1 established with reference to the number of samples per  
 2 area?  
 3 A. I'm not sure I understand your question.  
 4 You determine the over 95th percentile  
 5 confidence limit using the data from the samples that  
 6 are obtained, the test results that are obtained. In  
 7 this case it's referring to a site, data from a site.  
 8 Q. What number of samples are required to reach  
 9 a 95 percent confidence limit?  
 10 A. We don't specify a minimum number of samples  
 11 in the rule. I suppose the technically correct answer  
 12 is more than one.  
 13 Q. So your comment here was that the sampling  
 14 frequency is insufficient to determine compliance with  
 15 the MTCA standards; that to comply with the standards a  
 16 site must meet three requirements and the first is a 95  
 17 percent confidence limit on test results?  
 18 A. The first criteria is the upper 95th  
 19 confidence limit on the test results must meet the  
 20 standard.  
 21 Q. And the sampling frequency that you are  
 22 commenting on is the sampling -- the first sampling  
 23 schedule in the boxes underneath the text on Page 23;  
 24 is that correct?  
 25 A. No. I believe I was commenting on the third

1 and the attachment. It's the attachment has some  
 2 underlined headers that I believe were part of the  
 3 original document that was sent to me, and from what I  
 4 can recall I didn't add those.  
 5 Q. (BY MR. WITEK) Mr. Kmet, you can see there's  
 6 some numbering in the lower right-hand corner of the  
 7 pages.  
 8 A. Yes.  
 9 Q. Can you turn to Page 23 of Exhibit 31.  
 10 A. Yes.  
 11 Q. So this is your comment in the third  
 12 paragraph that's underlined discussing sampling  
 13 frequency?  
 14 A. That's correct.  
 15 Q. Can you explain to me the reference to a 95  
 16 percent confidence limit?  
 17 A. What I'm referencing here are the  
 18 requirements for determining compliance with the MTCA  
 19 cleanup standards that are in WAC 173-340-740.  
 20 Q. How do you establish what a confidence limit  
 21 is?  
 22 A. It's a statistical test. You take samples  
 23 and run the statistical test to determine the upper  
 24 95th confidence limit on the test results.  
 25 Q. Is the 95 percent confidence limit

1 set of boxes on Page 24. These first two boxes are  
 2 part of my comment.  
 3 Q. Thank you.  
 4 So looking at Exhibit 31, Page 24, the  
 5 sampling schedule that you reviewed, how is it, looking  
 6 at this sampling schedule, that you reached the opinion  
 7 the sampling frequency was insufficient?  
 8 A. Well, again, this comment is in the context  
 9 of the MTCA standards and it may or may not be  
 10 sufficient, depends on how scattered the data is,  
 11 whether or not that will be enough samples to  
 12 demonstrate that your upper 95th confidence limit on  
 13 your test results is meeting the standard.  
 14 Q. How does the sampling schedule that you were  
 15 asked to review compare to the sampling schedule that  
 16 you included in your comments?  
 17 A. Well, the first set of sampling schedule that  
 18 I had suggested as an alternative is the one that's in  
 19 our petroleum contaminated soil guidance and that has a  
 20 lot higher sampling frequency than what was provided to  
 21 me as proposed. The second block is -- was my  
 22 recommendation for native soil borrow pits, basically  
 23 clean areas.  
 24 Q. And with respect to your recommendation for  
 25 native soil borrow pits, how did you select the number

1 10 as the minimum number of samples?  
 2 A. You know, I don't remember, but probably  
 3 based on my experience with looking at data sets and  
 4 trying to figure out approximately how many samples  
 5 you'd need to try to demonstrate compliance with the  
 6 MTCA cleanup standards. Again, it depends greatly on  
 7 the variability of the data as to the number of samples  
 8 you'd need.

9 Q. Going back to Page 23, in the third  
 10 paragraph, this is on Exhibit 31, what was your second  
 11 principal recommendation?

12 A. The second point is again just a reiteration  
 13 of something that's in the rules which is that "No more  
 14 than 10 percent of the samples can be above the  
 15 standard."

16 Q. And what was your third principal  
 17 recommendation?

18 A. Again, the third requirement is a reiteration  
 19 of a requirement that's in the rule that no one soil  
 20 sample can be more than twice the standard.

21 Q. So these comments were delivered from you to  
 22 Mr. Fitzpatrick; is that correct?

23 A. That's what it appears from this e-mail that  
 24 I sent these comments -- this e-mail to Kevin  
 25 Fitzpatrick on September 8th, 2000.

1 A. It looks like it's the same schedule that I  
 2 commented on as part of this e-mail, and it wasn't  
 3 changed.

4 (Deposition Exhibit No. 32 was marked for  
 5 identification.)

6 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 32  
 7 look familiar?

8 A. Yes. It's a copy of an e-mail.

9 Q. Did you express concern to Mr. Yee about the  
 10 arsenic limits that were proposed for the fill criteria  
 11 in the 401 Certification?

12 A. According to this I did.

13 Q. Do you remember having discussions with  
 14 Mr. Yee about arsenic?

15 A. I don't remember if it was to Chung Yee or  
 16 someone, but I think in an earlier e-mail or one of  
 17 these e-mails I did make a comment about that. And I  
 18 don't remember if I had a conversation with him in  
 19 addition to those e-mails or what. I did mention it to  
 20 either Kevin or Chung. This says I was talking to him,  
 21 so I'll assume it's correct.

22 Q. This e-mail says, "He think," and I think  
 23 thinks was intended, "20 is too high and it should be  
 24 set to background. Background in Western Washington is  
 25 7 to 8." Is this description consistent with your

1 Q. Did Mr. Fitzpatrick respond to your comments  
 2 and suggestions?

3 A. No, I don't remember. If he did and I had an  
 4 e-mail, I would have provided that to you.

5 Q. Do you know whether your recommendations with  
 6 regard to sampling frequency were incorporated into the  
 7 401 Certification?

8 A. I'm not sure which document you're referring  
 9 to. Maybe we should start there.

10 Q. It's the one that has the September 21, 2001  
 11 date on it, and it's also labeled Exhibit 1 in the  
 12 lower right-hand corner, and discussion of the fill  
 13 criteria begins on Page 13 of 33.

14 MR. KRAY: Which -- Exhibit No. 1?

15 MR. WITEK: Sorry, it's Exhibit 1.

16 A. And your question again is.

17 Q. (BY MR. WITEK) I'll just ask a new question  
 18 and we'll move forward.

19 Is there a sampling schedule in the September  
 20 21, 401 Certification which is Exhibit 1?

21 A. I see a sampling schedule on Page 16 of that  
 22 document.

23 Q. And can you tell me how that sampling  
 24 schedule compares to the schedule you recommended in  
 25 the document that we're referring to as Exhibit 31?

1 memory of the discussions you had about arsenic?

2 A. Yes.

3 Q. And is that still your opinion today?

4 A. I'm not sure what -- in relation to what?

5 Q. Is it still your opinion that the fill  
 6 criteria should be set to Western Washington background  
 7 as opposed to 20 milligrams per kilogram?

8 A. I'm not sure I can answer that question. In  
 9 the context of the current certification, I haven't  
 10 done any evaluation of that. My recollection to this  
 11 conversation was in relation to the Method A cleanup  
 12 level, and at the time that standard was originally  
 13 promulgated in 1991, we believed 20 was natural  
 14 background for arsenic. Since then we've done sampling  
 15 throughout the state and learned that in Western  
 16 Washington, background is more on the order of 7 to 8  
 17 parts per million or milligrams per kilogram. And so  
 18 if I recall this discussion, the context of, if you're  
 19 going to set a standard based on natural background,  
 20 then you should be using 7 or 8, not 20, is the essence  
 21 of the conversation.

22 Q. Do you know what the limit is for arsenic i.  
 23 the September 21 401 Certification?

24 A. If it's the one on Page 17, it's 20  
 25 milligrams per kilogram.

1 Q. Did anyone ever respond to your comments or  
 2 suggestions regarding arsenic?  
 3 A. Again, I don't remember. There may have been  
 4 an e-mail. Again, if I printed a copy out of it, I  
 5 would have provided it to you.  
 6 (Deposition Exhibit No. 33 was marked for  
 7 identification.)  
 8 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 33  
 9 appear to be a copy of an e-mail from yourself to Chung  
 10 Yee sent on September 11th, 2000?  
 11 A. Yes.  
 12 Q. Does this look familiar?  
 13 A. Yes.  
 14 Q. Did you raise concerns about arsenic in this  
 15 e-mail?  
 16 A. Yes.  
 17 Q. This e-mail states, "I think you need to look  
 18 carefully at that value as the calculations indicate  
 19 the current Method A arsenic soil cleanup level may not  
 20 always be protective." Can you tell me what the  
 21 current Method A arsenic soil cleanup level was at the  
 22 time you wrote this e-mail?  
 23 A. 20 milligrams per kilogram or parts per  
 24 million.  
 25 Q. Did you express concerns about diesel, heavy

1 A. Yes. It is Table 749-3.  
 2 Q. And can you tell me what page number that's  
 3 on in the lower right-hand or left-hand corner?  
 4 A. Of Exhibit 28?  
 5 Q. That's correct.  
 6 A. Page 243, at least part of it's there. Part  
 7 of it's on Page 244 also.  
 8 MR. WITEK: Does anybody mind if we take a  
 9 five-minute break.  
 10 (Recess taken.)  
 11 Q. (BY MR. WITEK) Mr. Kmet, in Exhibit 33, did  
 12 you recommend the use of the values for terrestrial  
 13 ecological protection?  
 14 A. I'd suggested that Chung look at those  
 15 values.  
 16 Q. And those values are the ones in the table  
 17 that you've identified in Exhibit 28, Page 243 and 244?  
 18 A. That's correct.  
 19 Q. Can you turn to also -- if you have enough  
 20 desk space, table space -- to Exhibit 1, it's the  
 21 September 21 certification, Page 17 of 33. Can you  
 22 tell me how the fill criteria limitation for antimony  
 23 in the 401 Certification compares to the levels in  
 24 Table 749-3?  
 25 A. The level in the certification is 16

1 oil and mineral oil?  
 2 A. Yes.  
 3 Q. In the second paragraph from the bottom, you  
 4 stated, "Also, all of these values are based on human  
 5 health exposure pathways and do not take into account  
 6 ecological concerns." Can you explain to me what you  
 7 meant by "ecological concerns"?  
 8 A. Well, in the context of the soil cleanup  
 9 levels, these standards in the Method A tables at that  
 10 time were largely considering leaching and -- leaching  
 11 and the potential for contamination of groundwater and  
 12 direct human contact with the soil. Ecological  
 13 concerns are not directly taken into account and those  
 14 values. By ecological concerns I mean potential  
 15 impacts on plants, animals, wildlife, surface water  
 16 impacts.  
 17 Q. What were the ecological indicator  
 18 concentrations you were referring to in this e-mail?  
 19 A. I'm referring to specific Table 2 which I  
 20 believe is the now tables in the final adopted rule  
 21 Table 749-3, I think.  
 22 Q. Is the exhibit you're referring to now  
 23 Exhibit 28?  
 24 A. Yes.  
 25 Q. Have you identified the appropriate table?

1 milligrams per kilogram and the value in Table 749-3 is  
 2 5 milligrams per kilogram.  
 3 Q. Do you remember whether you had any  
 4 discussions or further e-mail exchanges with Chung Yee  
 5 or Kevin Fitzpatrick following your e-mail that's  
 6 Exhibit 33 regarding the issues you raised in the  
 7 e-mail?  
 8 A. There may have been some. I don't remember  
 9 if they were before or after this particular e-mail.  
 10 There was a series of e-mails that went back and forth  
 11 right about this time and, again, the ones that I had  
 12 printed out copies of I provided to my counsel anyway.  
 13 I assume you've received those.  
 14 (Deposition Exhibit No. 34 was marked for  
 15 identification.)  
 16 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 34  
 17 look familiar?  
 18 A. Yes, it's an e-mail I received from Craig  
 19 Thompson, June 7th.  
 20 Q. This e-mail states in part, the second  
 21 sentence, "Chung Yee and I would like to sit down with  
 22 you this coming Monday, 6/11/01, and talk (up to an  
 23 hour -- maybe less) about the concerns you expressed as  
 24 outlined below." Do you recall whether or not any such  
 25 sit down occurred?

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1 A. You know, I think we briefly met, but I don't  
2 remember going into any details about this -- these  
3 concerns. I don't even remember what we talked about,  
4 but I know that we -- I know that at some point I  
5 didn't -- we were going to meet and we had a brief  
6 conversation and we didn't end up going into any  
7 detailed conversation about this project.

8 (Deposition Exhibit No. 35 was marked for  
9 identification.)

10 Q. (BY MR. WITEK) Mr. Kmet, does Exhibit 35  
11 look familiar?

12 A. I don't know as if I've ever seen this  
13 particular e-mail. I may have.

14 Q. This e-mail states in part that, "On Monday,  
15 June 11, Mr. Craig Thompson had a limited discussion  
16 with Mr. Pete Kmet of the HQ/TCP on this project.  
17 Mr. Kmet recommended MTCA should not be used for the  
18 establishment of clean fill criteria for the  
19 Seattle-Tacoma International Airport Third Runway  
20 project. However, if MTCA is to be used for this  
21 purpose, Mr. Kmet further recommended all other  
22 requirements of the MTCA should be applied for the  
23 establishment of a clean fill criteria."

24 Do you think this is an accurate  
25 characterization of a conversation you had?

1 A. I think in another e-mail I expounded on  
2 that. But basically -- in fact, I think we may have  
3 talked about it earlier in one of these earlier  
4 e-mails. But it had to do with the testing  
5 requirements, making sure that all of the various  
6 requirements, not just the Method A standards, are  
7 complied with if they're going to use MTCA in that  
8 manner.

9 Q. Do you still have the document labeled  
10 Exhibit 31?

11 A. Yes.

12 Q. Is your comment about sampling frequency on  
13 Page 23 of Exhibit 31 one of the other requirements of  
14 the MTCA referred to in Exhibit 35?

15 A. Yes, I believe so.

16 Q. On Exhibit 35 which is the e-mail from Chung  
17 Yee to Kevin Fitzpatrick, Mr. Yee states or wrote,  
18 "Since his recommendations are considered as the  
19 department policy with respect to this project,  
20 therefore it would be inappropriate for me to comment  
21 on his recommendations."

22 Who do you take it Mr. Yee is referring to in  
23 this e-mail?

24 MS. BARNETT: Objection, calls for  
25 speculation.

1 A. Yeah. Now that I see this, I think this is  
2 referring to this earlier meeting that was referred to  
3 in that e-mail, and I think it is an accurate  
4 description of what I remember the discussion. We  
5 didn't get into detail about the criteria. It was more  
6 a conceptual level discussion which I think this  
7 captures.

8 Q. So conceptually on June 11th, 2001, you  
9 disagreed with using MTCA for the establishment of  
10 clean fill criteria for the airport third runway  
11 project?

12 A. That's what this is saying that I said at  
13 that time.

14 Q. And what was your conceptual objection?

15 A. To what?

16 Q. To the use of MTCA for the establishment of  
17 clean fill criteria for the SeaTac Airport third runway  
18 project.

19 A. Well, I think the essence of my concern was  
20 that the MTCA cleanup criteria are developed for the --  
21 to set standards for the cleanup of contaminated sites  
22 and that's what they're supposed to be used for, not  
23 for establishing what is or isn't clean fill.

24 Q. Do you know what the other requirements of  
25 MTCA are that are referred to in this e-mail?

1 A. I think he's referring to me. I guess you  
2 have to ask him.

3 Q. (BY MR. WITEK) Mr. Kmet, is there anyone  
4 else from your unit at the Toxics Cleanup Program that  
5 provided clean fill policy advice to the Northwest  
6 Region office?

7 MR. KRAY: Objection to the form of the  
8 question.

9 Q. (BY MR. WITEK) Is there anyone else from  
10 your office that provided comments, suggestions or  
11 recommendations to the Northwest Region office  
12 regarding clean fill criteria?

13 A. Well, I don't know. One of these e-mails  
14 shows that Craig Thompson was involved in the  
15 discussions and he's in our office. Beyond that I  
16 don't know who's had conversations about clean fill  
17 criteria.

18 (Deposition Exhibit No. 36 was marked for  
19 identification.)

20 Q. (BY MR. WITEK) Mr. Kmet, is Exhibit 36 an  
21 e-mail from yourself to Kevin Fitzpatrick on June 27  
22 2001?

23 A. That's correct, yes. It's a copy of it, Ann  
24 Kenny's copy.

25 Q. In the second paragraph in the e-mail, copy

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1 of the e-mail that is Exhibit 36, it states, "Note that  
2 this does not address potential human health exposure  
3 pathways or protection of aquatic organisms, which will  
4 need to be addressed with other language." Do you  
5 remember if anyone ever responded to this comment?

6 A. I don't remember. There may have been other  
7 e-mails. I don't remember anybody specifically  
8 responding.

9 Q. Do you know if any language was included in  
10 the 401 Certification to address these concerns?

11 A. My understanding is that these criteria that  
12 when they were developed by Chung Yee, he did look at  
13 these pathways.

14 Q. What is meant by a human health exposure  
15 pathway?

16 A. It would be -- in the context of this e-mail,  
17 I was probably thinking of the direct pathway -- person  
18 coming in direct contact with the soil, either  
19 ingesting it or dermally being exposed to it or  
20 drinking water that may have been contaminated by  
21 leaching of contaminants from the soil.

22 Q. So this e-mail lists several recommendations  
23 from you; is that correct?

24 A. Yes.

25 Q. And what was your second principal

1 Q. (BY MR. WITEK) And was it your  
2 recommendation that the most restrictive value in Table  
3 749-3 should be used?

4 A. Yes.

5 Q. And that table is Exhibit 28 on the Page  
6 marked 233 through 244?

7 A. Yes.

8 Q. Can you compare for me the most restrictive  
9 value in 749-3 to the fill criteria listed in the 401  
10 Certification, Exhibit 1 on Page 17?

11 A. Yes.

12 Q. Is the certification criteria for antimony  
13 lower or higher than the most restrictive value in  
14 Table 749-3?

15 A. Antimony is listed as 16 in the certification  
16 and in Table 749-3 it's 5, so it's higher.

17 Q. How about with respect to arsenic?

18 A. Arsenic is 20 in the certification and most  
19 stringent value in -- well, it depends on what type of  
20 arsenic you're referring to, but Table 749-3, the value  
21 for arsenic III is 7. Arsenic V, the most stringent is  
22 10.

23 Q. What's the difference between arsenic III and  
24 arsenic V?

25 A. The valent state of the arsenic.

1 recommendation?

2 A. I said, "Second, I am recommending we require  
3 the fill material to meet the most stringent value in  
4 Table 749-3 unless bioassay testing is conducted that  
5 demonstrates the fill is not toxic to plants and  
6 animals."

7 Q. Do you know whether bioassay testing is  
8 incorporated into the 401 Certification?

9 A. I don't know.

10 Q. Would you like to take a couple minutes to  
11 look at it?

12 A. I would have to review the whole thing here  
13 in order to answer that question. Do you really want  
14 me to do that?

15 Q. Mr. Kmet, can you answer the question with  
16 respect to the portion of the 401 Certification that's  
17 listed as Condition E which begins on Page 14 of 33 in  
18 Exhibit 1 and continues through to Page 19 of 33?

19 A. I can review those pages right now.

20 MR. KRAY: While he does that, why don't we  
21 take a short break.

22 MR. WITEK: That's fine.

23 (Recess taken.)

24 A. Yes. I don't see any specific reference to  
25 bioassays in that part of the permit or certification.

1 Q. In layman's terms, what's a valent state?

2 A. The form that the arsenic is in. In any  
3 event, 20 is higher than the most stringent value for  
4 both of those forms of arsenic in Table 749-3.

5 Q. How does the fill criteria limit for chromium  
6 in the 401 Certification compare to the most  
7 restrictive value listed on Table 749-3?

8 MR. KRAY: Go off the record for just a  
9 second.

10 MR. WITEK: Sure.

11 (Discussion off the record.)

12 A. Well, the total chrome value in the  
13 certification looks like it's 42, and the most  
14 stringent total chrome value in Table 749-3 is 42. So  
15 they're the same number. And then it goes on to say  
16 total chrome of 2000 in the certification -- fill with  
17 total chrome concentrations greater than 42 and less  
18 than 2000 may be placed to within six feet of the  
19 ground surface. No fill with a total chrome  
20 concentrations greater than 42 may be placed within the  
21 first six feet of the embankment.

22 Q. (BY MR. WITEK) Do you take that to mean that  
23 42 milligrams per kilogram is the certification limit  
24 applicable to the first six feet and that 2000  
25 milligrams per kilogram is the 401 Certification limit

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1 for chromium applicable to everything outside of the  
 2 upper six feet?  
 3 A. I'm not sure what the first six feet means.  
 4 Is it the bottom first six feet or the upper first six  
 5 feet? It's not clear to me what that refers to. But  
 6 anyway, there are two limits in the certification, to  
 7 answer your question, for total chrome, 42 and 2000,  
 8 and the Table 749-3 uses 42 as the most stringent  
 9 number. For chrome VI, 19 as specified in the footnote  
 10 to the Water Quality Certification table, and I don't  
 11 see a chrome VI number in --  
 12 Q. That's okay.  
 13 A. -- this table.  
 14 Q. I won't ask you to continue with chromium any  
 15 more.  
 16 I would ask you to make the comparison  
 17 between the -- I am asking you to make the comparison  
 18 between the fill criteria in the 401 Certification and  
 19 the most restrictive value on Table 749-3 with respect  
 20 to both selenium and silver.  
 21 A. For selenium the Water Quality Certification  
 22 requires -- uses 5. And the most stringent value in  
 23 Table 749-3 is .3.  
 24 For silver the value in the Water Quality  
 25 Certification is 5 and the most stringent value in

1 antimony?  
 2 A. There are a variety of them.  
 3 Q. Why are there a variety of them?  
 4 A. Probably reflecting the responses that we  
 5 received from various labs when we put this table  
 6 together.  
 7 Q. How many PQLs are there for antimony?  
 8 A. Well, there's a column labeled as PQL that  
 9 lists 1.5 and 16 as PQL, but it also provides a range  
 10 depending on the laboratory method anywhere from .00025  
 11 to 10 milligrams per kilogram.  
 12 Q. How does the or how do the two PQLs for  
 13 antimony compare to the most restrictive value on Table  
 14 749-3 for antimony?  
 15 A. Well, Table 749-3 uses 5 as the most  
 16 stringent value. As I mentioned before, PQLs in this  
 17 table that are part of implementation Memo No. 3 range  
 18 from .00025 to as high as 16.  
 19 Q. You stated earlier that this memo was dated.  
 20 Do you know whether additional PQLs have been  
 21 established since this memo was drafted?  
 22 A. I don't know, but we are intending eventually  
 23 to update this memo now that the new regulation has  
 24 been put in place.  
 25 Q. In the first listed test method for antimony

1 Table 749-3 is 2.  
 2 Q. Mr. Kmet, are you familiar with the term  
 3 practical quantitation limit?  
 4 A. Yes.  
 5 Q. Can you refer to the exhibit that's already  
 6 been marked as 26?  
 7 A. Yes.  
 8 Q. What is a practical quantitation limit in  
 9 layman's terms?  
 10 A. My understanding of the term is that's a  
 11 concentration that the lab can quantify. That's the  
 12 lowest concentration that a lab can quantify using that  
 13 particular analytical method.  
 14 Q. Does Exhibit 26 contain a table?  
 15 A. Yes.  
 16 Q. Does this table look familiar to you?  
 17 A. Yes.  
 18 Q. Can you just generally tell us what it is?  
 19 A. It's a summary of the practical quantitation  
 20 limits that we provided as part of this implementation  
 21 Memo No. 3. It's a summary of the PQLs that we  
 22 obtained from a variety of labs throughout the state  
 23 for various analytical methods. I might add this memo  
 24 is pretty dated, written in '93.  
 25 Q. Is there a PQL expressed in this table for

1 which has the No. 16 in the PQL column, there's a  
 2 thumb's up in the following column. Do you know what  
 3 that indicates?  
 4 A. I don't remember.  
 5 (Deposition Exhibit No. 37 was marked for  
 6 identification.)  
 7 A. I've seen another version of this that  
 8 defines those flags that are in here. I don't remember  
 9 what they are. One means it passes, the other means it  
 10 fails in comparison to the cleanup standards, I  
 11 believe.  
 12 Q. (BY MR. WITEK) Mr. Kmet, I'm handing you a  
 13 document, it's identified as Exhibit 37. Can you take  
 14 a few minutes to familiarize yourself with that.  
 15 On Exhibit 37, on the Page No. 3 of 4 in the  
 16 upper right-hand corner, does the second to the last  
 17 paragraph on the page explain what the thumb's up  
 18 means?  
 19 A. Yes. It indicates in some instances  
 20 indicated by a thumb's up icon in the tables, the labs  
 21 were able to attain a PQL lower than the federal PO'  
 22 For example, Table II for soil indicates antimony  
 23 Method 6010 attains a PQL range of 1.5 to 10 milligrams  
 24 per kilogram with a PQL of 16 milligrams per kilogram.  
 25 I'm sorry, I don't -- it's been a long time



1 since I looked at this particular guidance document. I  
2 did not develop this particular guidance.

3 Q. So with respect to Exhibit 26 and the two  
4 listed testing methods for antimony, do you have any  
5 reason to believe that Method 6010 is any more reliable  
6 than Method 7041?

7 A. I don't -- no, I don't know.

8 Q. If antimony levels of 5 milligrams per  
9 kilogram is a concern, would you use Method 6010 or  
10 Method 7041 for measuring antimony levels?

11 A. I think it would depend on the circumstances  
12 at the site and how easy or difficult it is to use  
13 these various analytical methods.

14 Q. Can you turn to the page marked Page 7 in the  
15 bottom of the middle of Exhibit 26?

16 MS. BARNETT: I'm sorry, would you repeat  
17 that?

18 MR. WITEK: It's the page marked Page 7 in  
19 the bottom middle of Exhibit 26 which is the attached  
20 PQL chart.

21 Q. (BY MR. WITEK) Are there multiple PQLs or  
22 testing methodologies for both selenium and silver?

23 A. Yes, there are several indicated here.

24 Q. So it's true that there are  
25 some -- well, what are the various ranges for the PQLs

1 A. It looks like it's .125 for selenium in  
2 implementation memo --

3 Q. I'm sorry, I was referring to Table 749-3,  
4 Exhibit 28.

5 A. I'm sorry. Your question again?

6 Q. Isn't it true that the most restrictive value  
7 in Table 749-3 for selenium is 1?

8 A. No, it's .3.

9 Q. And what's the lowest PQL for selenium  
10 identified in Exhibit 26?

11 A. .125.

12 Q. And what's the most restrictive value in  
13 Table 749-3 for silver?

14 A. 2 milligrams per kilogram.

15 Q. Is there a PQL in Exhibit 26 for silver  
16 that's capable of detecting silver at concentrations of  
17 2 milligrams per kilogram?

18 A. It appears there are labs that said they  
19 could achieve or quantify a concentration of silver  
20 below 2 milligrams per kilogram based on the  
21 information in this memo.

22 Q. Referring you now back to Exhibit 36.

23 A. Maybe I should -- I'm not an expert in  
24 chemistry, but the range of PQLs that's provided here  
25 is again a summary of what we receive back from labs

1 for selenium and silver?

2 A. For selenium it looks like the methods vary  
3 anywhere from .125 milligrams per kilogram to 20  
4 milligrams per kilogram. For silver they vary from it  
5 looks like .05 to 5 milligrams per kilogram.

6 Q. And how does that compare with the most  
7 restrictive value in Table 749-3 for selenium and  
8 silver?

9 MR. KRAY: Objection. Mr. Witek, these  
10 tables speak for themselves and I think it's an  
11 unnecessary consumption of time to walk through them.  
12 Either the table has the number or it does not have the  
13 number.

14 MR. WITEK: I'm going to do it and it's my  
15 deposition so I'll try to move along, but please bear  
16 with me.

17 A. The value of 5 milligrams per kilogram for  
18 silver is within the range of PQLs provided in  
19 implementation Memo No. 3. And the value of 5 for  
20 silver is within -- it looks like it's above the range  
21 or -- no, it's within the range of values that's  
22 provided for PQLs in implementation Memo No. 3.

23 Q. (BY MR. WITEK) So isn't it true that the  
24 most protective value in the three columns in Table  
25 749-3 for selenium is 1?

1 and -- my understanding depends heavily on the  
2 background, the matrix background, what other  
3 contaminants are in that material, clearly the  
4 analytical method makes a difference, whether they even  
5 have the equipment to run these tests, and again some  
6 of these methods may have changed since 1993. So I'm  
7 not sure where you're going with all of this, but I  
8 wouldn't take this Memo Implementation No. 3 to  
9 characterize the state of the art in analytical methods  
10 today.

11 Q. So is it possible that the PQLs are higher  
12 now?

13 A. They may very well be or they could be lower.  
14 That would take some checking with labs to see what  
15 they can do under the circumstances that you're -- type  
16 of soil you're trying to analyze, what other  
17 contaminants are in it, what method you're using to  
18 analyze the soil or prepare the soil. There's a  
19 variety of factors that come into play that establish  
20 PQLs.

21 Q. Do you think it's more likely if the values  
22 have changed that they're higher or lower?

23 A. You know, I'm not sure. It all depends on --  
24 well, I don't know, you know. Generally speaking,  
25 technology gets better and you can detect things lower,

1 but it all depends on what kind of interferences they  
2 have and how they're analyzing the soil sample. There  
3 are also some of these methods I think are probably  
4 pretty specific and kind of unique methods that not  
5 everybody could do or very few labs or maybe one lab  
6 can do so there might be some really low PQLs here, but  
7 from a practical point of view it would be very  
8 difficult to achieve those on a routine basis. So it  
9 really would take a look at -- you'd have to talk to  
10 the labs and figure out practically what they can or  
11 can't do.

12 Q. Do you know whether any of these factors were  
13 considered in the establishment of the fill criteria  
14 that were adopted in the 401 Certification?

15 A. I don't know.

16 Q. With reference to Exhibit 36 which is your  
17 e-mail to Mr. Fitzpatrick, what was your fourth  
18 recommendation?

19 A. "Fourth, because there can be considerable  
20 variability in soil concentrations and it is not  
21 possible to test every cubic inch of soil, I am  
22 recommending that the statistical test methods  
23 specified for soils in WAC 173-340-740 be used to  
24 analyze any test data and demonstrate compliance with  
25 these requirements."

1 Q. Do you know if you got a response to this  
2 comment in your e-mail?

3 A. I don't remember a specific response to that  
4 comment. There may have been one.

5 Q. Do you know whether or not any changes were  
6 made to the sampling schedule based upon these comments  
7 that were ultimately incorporated into the 401  
8 Certification?

9 A. I don't know.

10 Q. Can you look at Exhibit 1, Page 16 of 33. Is  
11 that sampling schedule consistent with your fourth  
12 recommendation in Exhibit 36?

13 A. Well, the sampling schedule really doesn't  
14 relate to this recommendation. This recommendation is  
15 referring to how you analyze the data you get once you  
16 sample. So from what I can tell, there's no -- the  
17 certification doesn't speak to how the data is to be  
18 analyzed, just my reading of this part of the  
19 certification.

20 Q. And you're referring to pages -- well, what  
21 part of the certification are you referring to?

22 A. 14 through 19. I mean the implication is  
23 it's a direct comparison, but there's no -- it doesn't  
24 really say, so I guess you'll have to ask people who  
25 wrote the certification on that.

1 Q. Should the certification include conditions  
2 to address statistical testing methods?

3 A. Well, my recommendation was that statistical  
4 methods be added to the certification. Should it,  
5 think that's up to the person preparing the  
6 certification and what was their intent.

7 MR. WITEK: Why don't we take a short break.  
8 (Recess taken.)

9 Q. (BY MR. WITEK) Mr. Kmet, on Exhibit 36, you  
10 made a recommendation regarding statistical test  
11 methods; is that correct?

12 A. Yes.

13 Q. And you recommended the test methods  
14 specified for soils in WAC 173-340-740?

15 A. That's correct.

16 (Deposition Exhibit No. 38 was marked for  
17 identification.)

18 Q. (BY MR. WITEK) Is Exhibit 38 the regulations  
19 that you were referring to for statistical testing  
20 methods?

21 A. It includes them, yes.

22 Q. Can you direct me to the portions of Exhibit  
23 38 that contain statistical test methods for specified  
24 soils?

25 A. Yes. It's subsection 7 starting on Page 173.

1 Q. Is it possible to describe in layman's terms  
2 what the testing protocols are that are called out for  
3 in the section beginning on Page 173 of Exhibit 38 that  
4 you referenced?

5 A. I'm sure it is.

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6 Q. Take your time.

7 A. Are you asking me to do that?

8 Q. Yes, please.

9 MR. KRAY: For the record, I'm going to  
10 object. The WAC speaks for itself. Mr. Kmet's  
11 interpretation of the law may differ from what the law  
12 says. So if you're asking him to give a legal  
13 conclusion, I object.

14 A. Well, again, as I mentioned in my e-mail, in  
15 general what this section is saying is is that there  
16 are three parts to soil compliance criteria in the  
17 rule. There's -- you've got to meet three parts to  
18 this test. One is is that the upper 95th confidence  
19 limit on the mean has to be less than the cleanup, soil  
20 cleanup level, that no single sample concentration  
21 shall be greater than two times the soil cleanup level,  
22 and less than 10 percent of the sample concentrati  
23 shall exceed the soil cleanup level. Those are sort of  
24 the three key elements of this. We do allow direct  
25 comparison under certain limited circumstances as

1 specified in the rule. But if you're using statistical  
2 methods, those are sort of the three key criteria that  
3 have to be met under this rule.

4 Q. (BY MR. WITEK) For purposes of establishing  
5 compliance with MTCA, why is it important that this  
6 regulation be followed?

7 MR. KRAY: Objection, calls for a legal  
8 conclusion. May call for a legal conclusion.

9 A. Well, these are the requirements in the  
10 regulation. So if you're using MTCA on a cleanup site,  
11 these are the requirements you have to comply with.

12 Q. (BY MR. WITEK) You mentioned earlier today  
13 that the MTCA regulations had recently been revised; is  
14 that correct?

15 A. Yes.

16 Q. Did that include parts of Exhibit 38?

17 A. This appears to be a -- the part of the  
18 regulation that we adopted earlier this year, which was  
19 the amendments to the cleanup regulation that were  
20 adopted -- this is dated February 12th, 2001. I  
21 believe that's the correct -- latest copy of the rule.

22 Q. Can you turn to Exhibit 1, Page 14 of 33 --  
23 I'm sorry, Page 15 of 33. Are you familiar with the  
24 environmental assessment that's called for in the third  
25 full paragraph on Page 15 of 33?

1 A. Yes.

2 Q. The first section under that heading states,  
3 "Toxic substances shall not be introduced above natural  
4 background levels in waters of the state which have the  
5 potential either singularly or cumulatively to  
6 adversely affect characteristic uses, cause acute or  
7 chronic toxicity to the most sensitive biota dependent  
8 upon those waters, or adversely affect public health,  
9 as determined by the department."

10 A. I see that.

11 Q. With reference to Exhibit 36, your June 27,  
12 2001 comments, do you believe the fill criteria that  
13 you were reviewing in this e-mail would assure  
14 compliance with the standard in the first section of  
15 173-201A-040?

16 MR. KRAY: Objection, calls for a legal  
17 conclusion, lack of foundation.

18 A. Well, I don't -- there are no criteria in  
19 this particular set of e-mails. What criteria are you  
20 referring to?

21 Q. (BY MR. WITEK) The fill criteria as they  
22 existed on June 27, 2001, do you have an opinion as to  
23 whether they would be effective to prevent toxic  
24 substances being introduced above natural background  
25 levels in waters of the state at the SeaTac Airport?

1 A. I'm familiar with them. I haven't looked at  
2 those particular standards for quite some time. I  
3 assume you're referring to the ASTM procedures in the  
4 third paragraph here, E 1527-00 and E 1903-97. I've  
5 seen those, I read them, but it's been quite a while  
6 since I've looked at them.

7 Q. Do you know whether a Phase I requires soil  
8 sampling?

9 A. You know, I can't remember. I would have to  
10 review those documents again.

11 Q. Mr. Kmet, do you have a copy of Exhibit 5?

12 A. Yes.

13 MR. KRAY: Off the record for a moment.

14 (Discussion off the record.)

15 MR. WITEK: Take a short break.

16 (Discussion off the record.)

17 (Deposition Exhibit No. 39 was marked for  
18 identification.)

19 Q. (BY MR. WITEK) Mr. Kmet, do you have a copy  
20 now of the document which has been labeled Exhibit 39?

21 A. Yes.

22 Q. Can you turn to what's labeled as Page 7 in  
23 the bottom right-hand corner?

24 A. Yes.

25 Q. Do you see WAC 173-201A-040?

1 MR. KRAY: Objection, calls for a legal  
2 conclusion, lack of foundation.

3 A. Could you tell me which criteria specifically  
4 you're referring to? I mean the substance of this  
5 e-mail is me providing comments about a very specific  
6 issue, series of issues. I do say that what I'm  
7 addressing in this e-mail doesn't address protection of  
8 aquatic organisms. My e-mail is not addressing WAC  
9 173-201A-040.

10 MR. WITEK: Thank you, Mr. Kmet. I don't  
11 have any more questions for you.

12 MR. KRAY: Nothing.

13 (Deposition concluded at 3:54 P.M.)

14 (Signature reserved.)

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**CORRECTION & SIGNATURE PAGE**

**RE:** AIRPORTS COMMUNITY COALITION V. STATE  
OF WASHINGTON, ET AL.  
POLLUTION CONTROL HEARINGS BOARD, PCHB No. 01-160  
DEPOSITION OF: PETER KMET, P.E., DECEMBER 19, 2001

I, PETER KMET, P.E., have read the  
within transcript taken DECEMBER 19, 2001, and the same  
is true and accurate except for any changes and/or  
corrections, if any, as follows:

PAGE	LINE	CORRECTION
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22		Signed at _____,
23		on the _____ day _____, 2002.
24		_____
25		PETER KMET, P.E.

**REPORTER'S CERTIFICATE**

I, CARLA R. WALLAT, the undersigned Certified Court  
Reporter and Notary Public, do hereby certify:

That the testimony and/or proceedings, a transcript  
of which is attached, was given before me at the time  
and place stated therein; that any and/or all  
witness(es) were by me duly sworn to tell the truth;  
that the sworn testimony and/or proceedings were by me  
stenographically recorded and transcribed under my  
supervision, to the best of my ability; that the  
foregoing transcript contains a full, true, and  
accurate record of all the sworn testimony and/or  
proceedings given and occurring at the time and place  
stated in the transcript; that I am in no way related  
to any party to the matter, nor to any counsel, nor do  
I have any financial interest in the event of the  
cause.

**WITNESS MY HAND AND SEAL** this 28th day of  
December 2001.

CARLA R. WALLAT, RPR, CRR, CCR #WALLCR346BE  
Notary Public in and for the State  
of Washington, residing in King  
County. Commission expires 1/17/02.

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