

No. 73419-4
THE SUPREME COURT OF WASHINGTON

PORT OF SEATTLE, a port district of the State of Washington,
Petitioner

v.

THE POLLUTION CONTROL HEARINGS BOARD, an agency of the
State of Washington,
Respondent,

AIRPORT COMMUNITIES COALITION; and CITIZENS AGAINST
SEA-TAC EXPANSION,
Petitioners,

v.

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, an agency
of the State of Washington,
Petitioner.

**COMBINED RESPONSE BRIEF OF PETITIONERS
AIRPORT COMMUNITIES COALITION AND
CITIZENS AGAINST SEA-TAC EXPANSION
RESPONDING TO OPENING BRIEFS OF PORT OF SEATTLE
AND DEPARTMENT OF ECOLOGY**

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I. INTRODUCTION

In this case, the Port and Ecology appeal a number of conditions imposed by the PCHB in its 139-page unanimous "Findings of Fact, Conclusions of Law, and Order" ("Order" or "Decision"). These were reached after consideration of the weight to be given to detailed technical testimony about the science of water quality, soil contamination and wetland mitigation.¹ The Port and Ecology ask this Court to substitute its judgment for that of the Board, reached after consideration of a nearly 60,000-page record and a two-week hearing involving dozens of expert witnesses.

The additional conditions imposed by the Board are all fully supported by ample evidence to convince a fair-minded person of the truth or correctness of the Board's Order. The Washington Administrative Procedure Act, Ch. 34.05 RCW ("APA"), does not permit the re-weighing of evidence that the Port and Ecology seek. Accordingly, Airport Communities Coalition ("ACC") and Citizens Against SeaTac Expansion ("CASE") respectfully request that this Court deny the petitions for review from the Port and Ecology.²

¹ While ACC and CASE have also sought review of portions of the Board's decision, the ACC and Case Petition, by comparison, accepts the Board's factual determinations and is instead focused upon legal issues, including whether the PCHB should have remanded the Certification to Ecology, whether the scope of the hearing should have been limited to the record available to Ecology at the time of certification, and whether, as a matter of law, Clean Water Act § 401's "reasonable assurance" standard can be met where the certification is issued before significant plans, reports and analyses have been prepared.

² Pursuant to an August 20, 2003, Ruling of the Supreme Court Clerk, ACC and case are filing one combined brief in response to the opening briefs of the Port and Ecology.

II. ARGUMENT

A. Substantial Evidence Supports the PCHB's Decision on the Numeric Fill Criteria

1. Background

The Third Runway would be constructed west of the two existing airport runways. Moving west from the existing runways, the ground elevation drops, sweeping toward Puget Sound, and forms the drainage basins for Des Moines, Miller, and Walker Creeks. The Port proposes to fill these existing drainage basins with over 23 million cubic yards of material;³ one million cubic yards is the equivalent of two football fields stacked 300 feet high.⁴ The vast quantity of fill material would be held back by an embankment that would extend the entire length of the 8,500-foot runway. In places, the embankment would be retained by a mechanically stabilized earth (“MSE”) wall 135 feet high at its tallest point (and further topped with a twenty-foot-high sloped embankment for a total height of 155 feet), for a distance of 1,500 feet.

There is no dispute that the use of contaminated fill material in the embankment poses a risk to water quality. The embankment would be constructed upon a rock drainfield three feet thick (the “drainage layer”) which is designed to collect groundwater seepage through the embankment and transport this water under the MSE wall to wetlands between the wall and relocated Miller Creek. Groundwater percolating

³ AR 040674 (Final Supplemental EIS at p. 5-4-3).

⁴ AR 027906 (08/10/01 Ecology press release, at p. 1).

through the embankment to wetlands and streams below could transport contaminants to those waters.⁵ Placement of the contaminated fill above the gravel drainage layer “provides a short path by which these contaminants can be transported to the creeks.” *Id.* Additionally, surface water runoff from the embankment could transport embankment contaminants to area wetlands and streams.⁶

Ecology’s § 401 Certification, at Condition E, attempted to address this risk through imposition of fill source screening procedures and numeric fill criteria (limits on pollution expressed in terms of milligrams of contaminants allowed per kilogram of soil or “mg/kg”).⁷ In the initial Ecology Certification issued on August 10, 2001, there were two sets of fill criteria: one set that applied to the embankment generally, and another, more restrictive set of criteria that applied to a six-foot layer along the top and bottom of the embankment.⁸

When the August Certification was appealed by the Port and subsequently withdrawn and replaced with the Port/Ecology-negotiated September 21, 2001, Certification, a new alternative was inserted allowing the Port to place a wedge of material complying with the more restrictive criteria only at the base of the embankment, in lieu of the six foot “sandwich” of cleaner fill material that would have covered the top and bottom of the embankment pursuant to the August Certification. Chung

⁵ AR 015518 (Dr. Patrick Lucia Prefiled Testimony at p. 5, ¶8.)

⁶ AR 015068 (Dr. John Strand Prefiled Testimony at p. 18, ¶33.)

⁷ AR 016903-908 (§ 401 Certification, Condition E, pp. 14-19).

⁸ AR 016954 (Aug. 10 Certification at p. 18)

Yee, the Ecology toxic substances expert assigned to evaluate the fill criteria, had completed his review on June 27, 2001, and was given no role in reviewing changes to the fill criteria (including the embankment design, numeric criteria or testing procedures) from the August to the September Certification.⁹ In fact, there is nothing in the record indicating that any of Ecology's designated contaminated soils experts reviewed any of the changes to the fill criteria or screening procedures from the August to the September Certifications.

It was with this background that the PCHB considered the trial testimony, reviewed the voluminous record, and ultimately found that some modifications to the fill criteria were warranted (decreasing the allowable concentrations of contaminants in the fill) to provide reasonable assurance that water quality standards ("WQS") would not be violated.¹⁰

2. The Board Modifications of the Fill Criteria Were Based on Substantial Evidence and the State Water Quality Standards' Explicit Mandate Against Introduction of Toxic Pollutants

In considering fill criteria, the Board's focus was particularly upon the state Water Quality Standards' ("WQS") anti-degradation mandate as well as the proposal's compliance with the WQS addressing toxic substances:

Toxic substances shall not be introduced above natural background levels in waters of the state which have the potential either singularly or cumulatively to adversely affect characteristic water uses, cause

⁹ AR 55966 (Transcript, Day 6, p. 13, ll. 13-15).

¹⁰ AR 000909-910 (PCHB Decision at p. 136-37).

acute or chronic toxicity to the most sensitive biota dependent upon those waters, or adversely affect public health, as determined by the Department.

WAC 173-201A-040(1) (emphases added). The Board had to resolve how to apply state surface and ground water standards, which are expressed in terms of allowable micrograms of contaminants per liter of water (a liquid phase), to criteria for fill material in a solid phase. In resolving this question and modifying the fill criteria in the September 2001 § 401 Certification, the PCHB relied upon the work of Ecology's own toxic substances expert from its toxics cleanup program, Chung Yee, who had not been consulted by Ecology itself since June 2001.

As noted above, Ecology had originally selected Mr. Yee for its team of experts that would review the Port's application for a CWA § 401 Certification. In that capacity, he used the "fixed parameter three-phase model" from State regulations (WAC 173-340-747) for implementation of the Model Toxics Control Act, Ch. 70.105(D) RCW ("MTCA"), to determine the suitability of the fill criteria. AR 033807-809 (three-phase calculations). The very purpose of this model is to "back calculate" or translate standards in one phase (solid, liquid or gas) to another-- e.g. if liquid phase standards are known, a solid phase standard can be calculated to determine how much contamination can be allowed in solid form (soil) before it will impose a risk to water quality. WAC 173-340-747(1). Mr. Yee started from state water quality standards for both surface water and ground water and, using the three-phase partitioning model, back-calculated solid phase standards (in milligrams per kilogram or mg/kg) for

each of the contaminants of concern listed in the Certification. *Id.*

However, as came out at trial before the PCHB, the standards Mr. Yee calculated were not fully and accurately reflected in the Certification subsequently issued by Ecology.¹¹

Therefore, in its decision, the Board rejected the fill criteria in the Certification which allowed use of fill material with contaminants at concentrations higher than the limits that Mr. Yee derived as necessary to ensure compliance with state surface and ground water standards for seven of the thirteen contaminants of concern.¹²

Despite this background, both the Port (Br. at 26-34) and Ecology (Br. at 28-38) argue that the Board's findings that the fill criteria were not protective of water quality and the Board's modification of the criteria are not supported by substantial evidence or, alternatively, arbitrary and capricious. These claims mask their true complaint: the Board, for good reason, chose to rely on the substantial testimony and exhibits which called for correction of the fill criteria. The Port's presentation to the contrary was not persuasive on its merits.¹³

For example, the Port protests the PCHB's lowering of the § 401 limit for antimony from 16 mg/kg to 5.79 mg/kg. However, this was

¹¹ AR 000803-804 (PCHB Order at 60-61).

¹² AR 000833-834 (PCHB Order at pp. 60-61).

¹³ The Port has also made no secret of the economic motivation for its arguments. While not a particular issue for normal projects which do not propose to fill an entire canyon, 23 million cubic yards of polluted fill would be considerably cheaper for that purpose than clean fill. AR 000762 (Port Motion for Reconsideration, noting that compliance with PCHB Condition #8 (prohibiting use of SPLP) would be cost "prohibitive"). The Port is already proposing to spend \$1.18 billion (the cost of a new airport in many other locations) to build the 8,500-foot runway where the canyon is now.

based upon Ecology's (Mr. Yee's) own three-phase model, which calculated that 5.79 mg/kg was the maximum amount of antimony that could be allowed to prevent violation of state groundwater standards. AR 033807.

The Board's application of Ecology's (Mr. Yee's) calculations was not indiscriminate. In a number of instances, Mr. Yee's three-phased calculations had derived soil concentrations that were lower than natural background levels. In such cases, the Board recognized that it would provide no benefit to set standards lower than background, and raised the toxicity limit up from Mr. Yee's calculated values to natural background levels. For example, the Ecology § 401 Certification allowed up to 20 mg/kg¹⁴ of arsenic in the embankment. Meanwhile, Mr. Yee had calculated that no more than 2.92 mg/kg of arsenic should be allowed in soil in order to meet ground water standards. AR 33807-808. However, the PCHB lowered the concentration of arsenic allowed in the embankment from 20 mg/kg to 7 mg/kg,¹⁵ higher than Mr. Yee's calculated limit, because 7 mg/kg is the natural background level for arsenic.

Similarly, Mr. Yee calculated that soil concentrations for cadmium could be no more than .69 mg/kg to meet ground water standards and .09 mg/kg to meet surface water standards (AR 033807-808), but the PCHB

¹⁴ 20 mg/kg is the Certification's limit for arsenic in the embankment outside of the "wedge" or drainage layer cover, where the limit was set to 7 mg/kg.

¹⁵ This is also the contamination limit that the Port agreed to use for material within the drainage layer cover.

only lowered the limit for cadmium to 1 mg/kg, the natural background level. For mercury, Mr. Yee calculated that .01 mg/kg was the appropriate soil concentration to assure compliance with surface water quality standards, but the Board set the limit higher, at .07 mg/kg, which was the background level. AR 033808.

In other cases, the PCHB set fill pollution limits for the entire embankment at the levels the Port had already agreed to use for fill material within the drainage layer cover. Thus, the PCHB lowered the limit for chromium to 42 mg/kg, for lead to 24 mg/kg, and for nickel to 48 mg/kg. In addition to the Yee calculations and the fact that the lower limits had already been applied for portions of the embankment, the Board's decision to adjust the fill criteria was supported by the testimony of ACC expert Dr. Patrick Lucia. Dr. Lucia, an international expert in such matters,¹⁶ testified that allowing fill with the higher contamination levels proposed by the Port to be placed next to the drainage layer increased the risk that water quality standards would be violated:

The September 401 Certification allows for placement of soil contaminated with total petroleum hydrocarbons and metals above natural background levels to be placed next to the gravel drainage layer underlying the embankment. Placement of contaminated fill next to the gravel drainage layer provides a short path by which these contaminants can be transported to the creeks.¹⁷

Based upon representations from the Port that no natural background levels were available for selenium and silver and that

¹⁶ AR 015551-557 (Curriculum Vita of Dr. Lucia).

¹⁷ AR 015518.

concentrations lower than 5 mg/kg could not reliably be detected¹⁸ (such a limit of detection is called the Practical Quantitation Limit or “PQL”), Ecology set the standards for selenium and silver to 5 mg/kg. In its brief (p. 35, n. 22), Ecology now admits that this was error.¹⁹ Fortunately (for water quality), the PCHB decision already lowered the limits for selenium and silver from 5 mg/kg each, to .52 mg/kg for selenium and .28 for silver, based on Mr. Yee’s three-phase calculated value to meet surface water standards.

Finally, the Board modified the Certification’s limit for gasoline, diesel and heavy oil in project fill. Incredibly, Ecology had agreed in the Certification to allow the Port to utilize fill with concentrations of gasoline at 30 mg/kg and of diesel and heavy oil at up to 2,000 mg/kg!²⁰ The Board disallowed the use of fill contaminated with gasoline, diesel or heavy oil based upon the trial testimony of Kevin Fitzpatrick, Ecology’s water quality supervisor for the Northwest Regional office. Mr. Fitzpatrick admitted that it was “an error in our logic [to allow petroleum contaminated soils] in that you would not have what are essentially man-made constituents on an uncontaminated site.”²¹

¹⁸ Even in its prefiled testimony the Port was still maintaining that 5 mg/kg was the lowest concentrations laboratories could reliably detect. AR 012553 (prefiled testimony of Port Consultant C. Linn Gould, p. 5, ¶ 12).

¹⁹ In fact, actual sampling data supplied by the Port indicates that its testing methodologies are capable of detecting soil concentrations for nearly all the contaminants of concern at levels below .5 mg/kg – significantly lower than the PQLs utilized by Mr. Yee. AR 019801-806 (Third Runway Project Off-Site Borrow Source Baseline Chemical Characterization Black River Quarry, Appendix A, pp. 2-7 of 19.)

²⁰ AR 016906 (§ 401 Certification, p. 17.)

²¹ AR 055812 (Fitzpatrick, Tr. at Day 5, p. 5-0051, lines 3-5)

The introduction of any level of gasoline, diesel and heavy oil into waters of the state is contrary to Washington’s antidegradation water quality standard which generally precludes the lowering of existing water quality. WAC 173-201A-070. Further, Washington’s toxic substances WQS generally prohibits the introduction of substances above natural back ground levels in waters of the state, which include wetlands. *See, e.g.*, WAC 173-201A-040(1) and WAC 173-201A-020. Gasoline, diesel and heavy oil are not natural substances. Consequently, the intentional introduction of any level of petroleum contamination into state waters violates WQS.

The Port still argues (Br. at 34) that it was error for the Board to set the limits for gasoline, diesel and heavy oil to zero because laboratory analyses for detecting these constituents might detect “natural occurring” petroleum from decayed plant matter, citing Port “expert” testimony to this effect.²² Appropriately, the Board was “not persuaded” by this testimony.²³

3. The Port and Ecology Offer Nothing Sufficient to Overcome the Board’s Well-Founded Findings and Decision

In asking that this Court overturn the Board decision, the Port and Ecology offer very little of substance -- let alone a demonstration of the

²² This Port argument harkens back to a claim made in the 1980s in defense of certain forestry activities that elimination of trees was beneficial because trees cause pollution.

²³ AR 000835 (PCHB Order at p. 62). For example, the record reflected that the Port had already imported contaminated soils from the Black River Quarry site, the Summit Ridge site, the First Avenue Bridge site, and from three additional locations at the Airport which were all impacted by refined petroleum products, not by-products of decaying ferns.

absence of substantial evidence for the Board's decision to modify the Ecology Certification's limits on toxic pollutants. The few points offered are at best in the nature of one-sided recitations of a multi-faceted record, rather than telling grounds for reversal.

The Port (Br. at p.37-38) takes issue with the Board's decision to set the fill criteria, in some instances, based upon 90th percentile natural background levels (meaning that 90% of samples have concentrations below that level). The Port argues that even uncontaminated sites would fail the criteria 78% of the time if the Port is required to comply with this standard. This argument is based on statistical manipulation. First, not all the fill criteria in the Board's decision are set to 90th percentile natural background. There are no such background levels set for antimony, selenium, silver, or thalium, so the Port's objection would not apply to those toxic metals. AR 017344. For the others, the Port's statistical complaint seeks to avoid the safety factor built in by using 90th percentile values. This is inherent in the applicable state regulations and was not created specially to burden the Port's application. In fact, Washington's MTCA allows the use of natural background concentrations as site cleanup standards, but requires an even more stringent method for determining natural background than adopted by the Board: "for lognormally distributed data sets, background shall be defined as the true upper 90th percentile or four times the true 50th percentile, whichever is lower." WAC 173-340-709 (emphasis added). MTCA creates no

exception to this standard when a party has to test for more than one contaminant, an exception which the Port nevertheless demands here.

Ecology (Br. at pp. 36-37) and the Port (Br. at pp. 31-32) also complain that ACC expert, Dr. Patrick Lucia, did not perform his own calculations to come up with fill criteria and had not reviewed Ecology's Mr. Yee's work. AR 055426. This argument is misdirected: Dr. Lucia's concern derived from the water quality risk of the original August Certification and the increased risk from the September Certification's proposed drainage layer, which would concentrate the contaminants allowed by the Ecology toxic fill standards.²⁴

The Port argues (Br. at 31 and n. 9) that the PCHB's decision to adjust the limits on toxic fill was not supported by substantial evidence because a Port consultant testified, based upon a computer model, that Ecology's limits would not lead to water quality violations. The Board considered this model, but rejected its analysis and conclusions, based in part upon testimony from Dr. Lucia.²⁵

²⁴ "The drainage layer under the embankment fill is in essence a blanket drain that collects the seepage through the fill. Without the drainage system the water would be naturally dispersed into the underlying soils and groundwater. With the drainage system the water will be collected in the drainage system and diverted through channels and pipes to the creeks. The concentrations of metals or organics in the water discharged from the embankment may be small but the volume of water will be large. The total mass of metals collected at the discharge point to the creeks will correspondingly be larger than would have occurred under conditions without the embankment in place. Over time, the concentration of metals in the creek sediments due to the concentrated discharge of the embankment drainage water will be larger than predicted assuming dispersion of the water seeping through the embankment."

AR 015524-525.

²⁵ AR 000840 (PCHB Order at p. 67, noting that the testimony of the Port witness was rebutted). As discussed below, the Port's modeling was also recognized -- including by

The Port model predicted, for example, that only one contamination particle in the soil matrix (for arsenic) would be liberated from soil particles in the embankment for each 1570 contaminant particles that remained in the soil.²⁶ While Dr. Lucia did not take issue with this “partitioning factor” used by the Port to model leaching of contaminants from soil in the embankment, he testified that the Port’s model of the absorptive ability of the drainage layer cover was ill-conceived. It assumed that the drainage layer, which by virtue of the Port’s need to gather water and convey it to wetlands and streams would collect all of the leachate, acted like a “huge sponge.” In other words, the model erroneously assumed that the drainage layer did not “allow any of the metals to be transported out of the drainage layer.”²⁷ Thus, the model erroneously assumed that for every 22,900 particles of contaminants leaching into the drainage layer cover, only one would pass through and be conveyed to the streams and wetlands dependent on the drainage layer for water supply.²⁸

As Dr. Lucia explained, this was error because the contaminants, having leached from the fill soil, would only be adsorbing to the outside of soil particles in the drainage layer -- a significantly weaker bond than that occurring when contaminants are internally bound up in soil. *Id.* Thus the model’s partitioning factor for adsorption should have been significantly

Ecology’s own outside expert reviewer -- as considerably less than unassailable in the low streamflow context. *See* section II.F, *infra*.

²⁶ AR 056941 (Tr., Day 10, at p. 10-0096).

²⁷ AR 056942 (Tr., Day 10, at p. 97, ll. 7-12).

²⁸ AR 056943 (Tr., Day 10, pp. 9-0098, ll. 4-17).

lower, by “orders of magnitude” than the partitioning factor for leaching, resulting in grossly erroneous modeling predictions.²⁹

The Board found Dr. Lucia’s testimony on this point to be more credible. On review, under the substantial evidence test, a court “will not substitute its judgment on witness credibility or the weight to be given conflicting evidence.”³⁰

4. Deference Considerations Support the Board’s Decision

Ecology (Br. at 30) and the Port (Br. at 30) argue that this Court should defer to Ecology’s expertise and reject the PCHB’s modified fill criteria.³¹ Even assuming, for argument’s sake that the Court should defer to Ecology’s expertise rather than the PCHB’s, such deference would support the Board’s decision. Those with expertise at Ecology in fact expressed concern about Ecology’s Certification fill criteria. They produced analyses showing that the criteria were not protective of water

²⁹ AR 056944 (Tr., Day 10, at p.99, ll. 10-25).

³⁰ *Western Ports Transportation Inc., v. Employment Security Department*, 110 Wn. App. 440, 449, 41 P.3d 510 (Div. 1 2002). See also *Bowers v. Pollution Control Hearings Board*, 103 Wn. App. 587, 597, 13 P.3d 1076 (Div. 1, 2000), *rev. denied*, 144 Wn.2d 1005, 29 P.3d 717 (2001) (“We neither weigh credibility nor substitute our judgment for that of the agency”); *U.S. West Communications, Inc. v. Washington Utilities & Transportation Commission*, 134 Wn.2d 48, 62, 949 P.2d 1321 (1997) (“It is not a reviewing court’s task to weigh credibility, and we will not substitute our judgment for that of the [agency]....”).

³¹ The Port also argues (Br. at 29, n. 7) that the Board should have found the fill criteria adequate because the criteria were accepted by the U.S. Fish and Wildlife Service as part of its review under the Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”). However, USFWS jurisdiction and ESA review were limited and based on a small fraction of the material presented to the PCHB. It did not include the extensive record and trial testimony and cross-examination of experts presented to the PCHB. In addition, the scope of analysis in applying state water quality standards as required under CWA § 401 is much more rigorous than the Service’s review under the ESA, which is focused tightly upon potential effects on listed species. If a letter from the USFWS sufficed to satisfy state water quality standards, then no CWA § 401 certification would be required.

quality, suggesting that Ecology upper-level management had issued the Certification in disregard of its experts.

For example, Ecology's Mr. Yee prepared the three-phase modeling pursuant to WAC 172-340-747 demonstrating that, in many instances, the contamination limits in the Certification were not adequate to meet state surface or groundwater standards. Ecology's Mr. Fitzpatrick testified before the PCHB that it was "a mistake" to include criteria for gasoline, diesel or heavy oil.³² Peter Kmet, a senior environmental scientist in Ecology's Toxics Cleanup Program, repeatedly questioned the adequacy of the fill criteria. Mr. Kmet recommended against using cleanup standards in MTCA for the establishment of fill criteria for the 3RW Project,³³ and he raised concerns about allowing petroleum contaminated soils.³⁴ Mr. Yee acknowledged in his testimony that Mr. Kmet had in fact raised concerns about allowing concentrations of petroleum hydrocarbons in the fill as early as September of 2000³⁵ -- concerns that Ecology management disregarded.

Principles of agency deference are based upon expertise. Neither the Board nor this Court should be expected to give deference to agency arguments at odds with what its own experts concluded.

³² AR 055812 (Fitzpatrick, Tr. at Day 5, p. 5-0051, lines 3-5.).

³³ AR 017301 (06/13/01 Email from Chung Yee to Kevin Fitzpatrick); AR 028829 (Deposition of Peter Kmet, p. 26, lines 8-23).

³⁴ AR 017496 (09/11/00 Email from Peter Kmet to Chung Yee).

³⁵ AR 055961 (Yee, Tr. at Day 6, p. 6-0008, lines 5-16); *see also* AR 017496 (09/11/00 Email from Peter Kmet to Chung Yee).

The PCHB's findings are amply supported by evidence that is sufficient to persuade a fair-minded person of the truth or correctness of the order. The Court has been offered no cognizable basis to overturn them.

B. Substantial Evidence Supports the PCHB's Findings that the Port's Synthetic Precipitation Leaching Procedure ("SPLP") Work Plan Was Not an Appropriate Method in This Case for Determining Compliance with Water Quality Standards

Another change between the August 10 and the September 21 § 401 Certifications was the insertion of a new second chance method, based upon the Synthetic Precipitation Leaching Procedure ("SPLP"), for the Port to gain approval for use of fill material that exceeded the Certification limits on toxic contaminants established to ensure compliance with state water quality standards.³⁶ The PCHB explained the Port's proposed use of the SPLP:

The SPLP is a test in which fluid is passed through a soil sample with the fluid then collected and analyzed for contaminants. The results from the SPLP are then compared to freshwater ambient water quality criteria in WAC 173-201A-040 (adjusted for PQLs).³⁷

There is nothing in the record to establish that any technical experts from Ecology's toxic cleanup program reviewed or approved this SPLP work plan prior to its inclusion in the Certification. In fact, the revisions to the fill criteria in the September § 401 Certification, including

³⁶ AR 000791 (PCHB Order at p. 18).

³⁷ AR 000838 (PCHB Order at p. 65).

insertion of the Port’s SPLP workplan, can be traced to a weekend email exchange between Port counsel and Ecology counsel during their negotiations over the revisions to the Certification. In that exchange, Port counsel stated:

Because of the substantial changes, I just redrafted our proposal for the added language on this one. You’ll recognize some of it from mine and some from yours. The wedge idea needed to go in, too ... I still need to get you the revised [SPLP] Workplan.³⁸

The language ultimately included in the Certification incorporates a particular version of the SPLP procedure proposed by the Port in an attached “workplan”:

If proposed fill (for either the drainage layer cover or the rest of the embankment or other Port 404 projects) does not meet the fill criteria in condition E(1)(b), the Port can demonstrate the suitability of the fill by employing a [SPLP], SW-846 Method 1312. SPLP testing shall be conducted according to the SPLP work plan, attachment E, or as amended in the future.³⁹

The PCHB articulated four reasons for rejecting the Port’s proposed SPLP work plan. First, the Board stated that the SPLP procedure:

does not address the complete set of water quality standards, only the toxic substances surface water standards (WAC 197 [173]-201A-040), and ignores state groundwater standards such as Chapter 173-201A WAC.⁴⁰

The Board further noted that:

³⁸ AR 019517 (September 8, 2001, Email from Port counsel to Ecology counsel).

³⁹ AR 016907 (Certification at p. 18).

⁴⁰ AR 000838 (PCHB Order at 65).

WAC 173-201A-040, the surface water toxic substances criteria, do not establish standards for antimony, beryllium, silver, and thallium, which are all listed as constituents of concern under the § 401 Certification. Thus, there is no standard in WAC 173-201A-040 for these contaminants by which to evaluate the SPLP results.⁴¹

The PCHB also identified the lack of a statistically meaningful test protocol for the Port's SPLP workplan as "only one SPLP sample is required to be collected for each original screening sample that exceeds the screening criteria." *Id.*

Thus, three of the reasons for the PCHB's disallowance of the Port's SPLP workplan concerned its failure to address all applicable water quality standards (a key consideration for CWA § 401 certification) and its failure to require enough samples to adequately characterize a site. Significantly, these three flaws would exist regardless of the validity of the SPLP test itself.

Finally, the record presented to the PCHB had demonstrated that the Port's SPLP workplan was incapable of detecting contaminants of concern at the levels established in WAC 173-201A-040:

Ten of the thirteen metals listed in the § 401 Certification have a hardness adjusted fresh water chronic standard lower than 50 micrograms / liter. The SPLP procedure is, however, ineffective at determining compliance with water quality standards for these metals because the SPLP's reporting limit is higher than the § 401 contamination limit.⁴²

⁴¹ AR 000839 (PCHB Order at 66).

⁴² There are ten toxic metals with hardness-adjusted freshwater chronic criterion less than 50 micrograms/liter, including antimony, beryllium, cadmium, total chromium, copper, lead, mercury, selenium, silver and thallium. AR 019624 (Three-phase Back Calculations).

Id. at pp. 65-66. This PCHB finding was based in part on an SPLP report prepared by one of the Port's own consultants, which had been used to approve contaminated fill material from the Black River Quarry for importation to the Third Runway.⁴³

The Port (Br. at 35-43) and Ecology (Br. at 38-47) both argue that the PCHB erred in prohibiting the use of the Port's SPLP workplan to override toxic contamination limits. The Port argues (Br. at 39) that the Board erroneously found that "the Port had previously used SPLP to accept fill that exceeded the upper bound limits set in the [401 certification]." Ecology (Br. at 42-43) joins in this argument. Here, the Port and Ecology mischaracterize the Board's Order. The Board's concern was not that the Port had violated the "upper bound limits" set in its SPLP workplan. Rather, the Board states, as the Port's brief concedes (at 39), that "after site sampling shows a site has failed to meet MTCA method A based initial screening criteria [that is, the numeric limits on toxic contaminants set in the Certification], the Port uses the SPLP to approve the importation of fill material." AR 000838 (PCHB Order at p. 65). The Board identified this fact -- that the SPLP test was used to approve material that failed to meet criteria established as necessary to ensure compliance with water quality standards -- as a key predicate to whether SPLP would in fact prevent violation of WQS. The Board was concerned because the Port had already accepted fill material from the

⁴³ AR 019785-019839 (Hart Crowser, December 12, 2001, Third Runway Project Offsite Borrow Source Baseline Chemical Characterization, Black River Quarry).

Black River Quarry site, the Kent-Kangley pit, the Marine View pit and CIT pit #3 (four of the seven sites that were being used as fill sources at the time of the trial) based upon the use of SPLP tests which, it turned out, were ineffective at checking for violations of the toxic contamination limits.⁴⁴

The Port (Br. at 39) and Ecology (Br. at 45-46) argue that the Board erred in finding that the Port's testing workplan was "in large part incapable of detecting contaminants of concern" at levels below the water quality standards. The Port suggests that the Board erred here because the SPLP is not itself an analytical method, but instead is a method for producing leachate which is then tested using other analytical methods. This argument is of no consequence. The Board was clearly speaking to the SPLP work plan or procedure as actually employed by the Port, including the leachate extraction procedure and the analytical method used to evaluate the leachate. The Board's finding here is supported by substantial evidence -- including the report of the Port's SPLP test results used to approve admittedly violative fill material from the Black River quarry.⁴⁵

That report states that copper concentrations from six samples ranged from 95.7 to 131 mg/kg – more than three times the 36 mg/kg limit for copper in the 401 Certification. This fill material was then tested using

⁴⁴ AR 056740-742 (Clark, Tr. at Day 9, pp. 9-0134, line 14, to 9-0136, line 5).

⁴⁵ AR 019785-839 (Third Runway Project Off-Site Borrow Source Baseline Chemical Characterization Black River Quarry Renton, Washington).

the Port's SPLP procedure and **approved** because copper was not detected "above the reporting limit⁴⁶ of .05 mg/kg (mg/l) [or 50 ug/l]⁴⁷ using SPLP methodology." *Id.* at p. 2. In fact, the SPLP test results in that report indicate that, for each contaminant tested, the reporting limit was 50 micrograms/liter, so that any contaminant that had a WAC 173-201A-040 hardness-adjusted criterion lower than 50 micrograms/liter could not be detected. This concerned the Board greatly because 10 of the 13 metals listed in the 401 Certification have a hardness-adjusted⁴⁸ freshwater chronic limit **lower** than 50 micrograms/liter ("ug/l").⁴⁹ Thus, for these 10 metals (including copper, which has a freshwater ambient standard of 9 ug/l), violations of the applicable limits up to 50 ug/l would have gone undetected. Copper could have been present at five times the limit (45 ug/l), and no one would have known. Clearly, the Board's concerns about the Port's SPLP work plans reporting limits were supported by substantial evidence.

The Port and Ecology both point to a spreadsheet of SPLP results (AR 053541) to argue that in some instances laboratories can detect contaminants in SPLP leachate at levels lower than the water quality standards. That spreadsheet (AR 053541) reports the results from 28

⁴⁶ The reporting limit is the lowest concentration that can be measured for a sample using the test procedure employed.

⁴⁷ Milligrams per liter can be converted to micrograms per liter by multiplying by 1000, thus .05 mg/l X 1000 = 50 micrograms/liter.

⁴⁸ The freshwater quality standards in WAC 173-201A-040 fluctuate with the amount of calcium and magnesium in the water ("hardness"). The standards that the Board relied upon for its findings regarding the adjusted standards were prepared by Port Consultant C. Linn Gould. AR 019624 (Three-phase back calculations).

⁴⁹ AR 019624 (Three-phase back calculations).

SPLP tests, yet in at least 15 of those 28 tests, the reporting limit was 50 ug/l or higher for at least one constituent. Again, on the record presented to the Board, there is more than sufficient evidence for a fair-minded person to conclude that the Port's SPLP workplan is not capable of routinely and reliably detecting contaminants at levels low enough to determine compliance with state water quality standards.

The Port (Br. at 41) and Ecology (Br. at 43-44) also argue that there was no evidence to support the Board's finding that there was no statistically meaningful test protocol for employing the SPLP test. This is nonsense. The Board's concerns were based upon the plain language of the Certification itself, which provided that, "at a minimum, one SPLP sample will be collected for each original sample that exceeds the screening criteria."⁵⁰ Thus, even for a very large fill source site (e.g., literally millions of cubic yards), where one screening sample demonstrated that the numeric fill criteria are exceeded, the entire site could be approved for importation based on just one SPLP test.

The Port (Br. at 41) and Ecology (Br. at 46-47) next claim that the Board's finding that there was no freshwater ambient standard in WAC 173-201A-040 for antimony, beryllium, silver, and thallium was an erroneous interpretation of the WQS. The Port bases this argument on the following language from subsection 5 of that regulation:

Concentrations of toxic and other substances with toxic properties not listed in subsection (3) of this section *shall be determined in*

⁵⁰ AR 016933 (§ 401 Certification, Attachment E, page 3).

consideration of USEPA Quality Criteria for Water, 1986, and as revised, and other relevant information as appropriate.

WAC 173-201A-040(5) (emphasis added). This section does not provide standards, but a suggestion as to how some might someday be adopted. In light of this, and remembering that no technical expert at Ecology reviewed the Port's SPLP workplan prior to its inclusion in the September 21 Certification, the Board appropriately concluded that no standard had been established for the contaminants not specifically listed in WAC 173-201A-040(3).

Finally, both the Port (Br. at 42) and Ecology (Br. at 47) acknowledge that the Board properly concluded that the Port's SPLP workplan was flawed because it only required comparison of the SPLP test results against surface water standards, and ignored state groundwater standards. This admission alone undercuts the attack on the Board's decision concerning SPLP.⁵¹

⁵¹ Further, any modification of the SPLP workplan to address this fundamental flaw would have to occur below -- not in this Court, as would also be the case with any modification of the Board's decision rejecting use of the SPLP workplan. The APA generally provides that:

The Court shall remand to the agency for modification of agency action, unless remand is impracticable or would cause unnecessary delay."

RCW 34.05.574(1). The plain reading of the statute is confirmed by the

WASHINGTON ADMINISTRATIVE LAW PRACTICE MANUAL, which states:

§ 10.06 REMEDIES AVAILABLE ON JUDICIAL REVIEW

A. Remedies that Can Be Granted

* * *

The final sentence of RCW 34.05.574(1) deserves special mention. It directs the reviewing court to remand the matter to the agency for modification when the agency action is not being affirmed by the court. The only exceptions are when remand is impracticable or would cause unnecessary delay. This sentence is a recognition of the proper division of authority between the administrative agency and the court. The court acts as a check on the agency's action and does not act in place of the agency. This concept is consistent with the case law. *See Manke Lumber Co. v. Diehl*, 91 Wn. App. 793, 959 P.2d 1173 (1998), *review*

The arguments advanced for reversing the Board's decision to prohibit use of the SPLP work plan, much like the attacks on the modified fill criteria, consist largely of pointing to some scintilla of conflicting evidence in the record and asking this Court to substitute its judgment for that of the Board. This would not be appropriate in any APA review case, let alone this one, where second-guessing the Board's weighing of the evidence involves a two-week trial and a 57,000-page record.

C. **Substitute Senate Bill (“SSB”) 5787, as Applied to the Third Runway Project, Unconstitutionally Intrudes into Judicial Functions, Conflicts with Clean Water Act § 401, and Is Unconstitutional Special Legislation**

1. **Background**

The Port (Br. at p. 38-39) and Ecology (Br. at p. 39-40) argue that their appeals of the Board's order, prohibiting the use of the SPLP test to approve importation of fill exceeding the numeric fill criteria, is now moot because the legislature has passed, and on May 9, 2003, the Governor signed, Substitute Senate Bill (“SSB”) 5787. That bill provides, in pertinent part, that:

Sec. 1. A new section is added to chapter 90.48 RCW [Water Pollution Control] to read as follows:

(1) In order to ensure that construction projects involving the use of fill material do not pose a threat to water quality, the

denied, 137 Wn.2d 1018 (1999). See also *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984), where remand was the appropriate remedy where the agency's proceeding was based on an incorrect interpretation of the law.

WASHINGTON ADMINISTRATIVE LAW PRACTICE MANUAL, § 10.06.A.

department [of Ecology] may require that the suitability of potential fill material be evaluated using a leaching test included in the soil clean-up rules adopted by the department under chapter 70.105D RCW in any water quality certification issued under section 401 of the federal clean water act and in any administrative order issued under this chapter, where such certification or administrative order authorizes the placement of fill material, some or all of which will be placed in waters of the state. **Any such requirement imposed by the department in a water quality certification or administrative order issued prior to the effective date of this section is ratified and approved by the legislature** as a valid and reliable method for determining concentrations of chemical constituents that can be present in fill material without posing an unacceptable risk of violating water quality standards, and shall be in effect as imposed by the department for all work not completed by June 1, 2003.⁵²

ACC challenged the application of SSB 5787 to the Third Runway Project by filing a Petition Against State Officer in the Supreme Court. Appendix 1. Ecology and the Port sought dismissal, arguing *inter alia* that the issues raised by the legislation would already be addressed in this action. The Supreme Court Commissioner therefore granted dismissal, but only upon the understanding that:

The Port of Seattle has stipulated that it will raise SSB 5787 (arguing that the statute essentially moots a portion of the Board's decision) in its opening brief in the appeal. Together with the Coalition's briefing in response, this will insure that the issues regarding the statute are fully presented to the court.

Appendix 2 (July 11, 2003, Ruling dismissing Original Action).

2. The Court Should Not Consider the "Mootness" Claim

⁵² Appendix 1-J (Laws of Washington 2003, Chapter 210 (Substitute Senate Bill No. 5787), signed by the Governor on May 9, 2003) (emphasis added).

Clearly, the Commissioner's Order contemplated briefing rather than a bare suggestion by the Port (Br. at 39-40) and Ecology (Br. at 38-39) that SSB 5787 "moots" that part of the Board's decision prohibiting the use of the Port's SPLP workplan. Because this Court does not consider arguments offered without briefing and citation to authority, the mootness claim should not be considered here.

The Commissioner's reference to the Port's opening brief and to ACC's response (this brief) clearly anticipates compliance by respondents with RAP 10.3(a)(5) (brief should contain "the argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record."). Neither the Port nor Ecology comply⁵³ This Court's rule is to disregard such unsupported arguments.⁵⁴

The effect of respondents' failure to provide authority for their SSB 5787 arguments now, unless redressed by this Court, is to leave ACC

⁵³ Neither the Port nor Ecology cite any cases discussing mootness. Ecology (Br. at 40) offers a "see" citation to *Haberman v. WPPSS*, 109 Wn.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987) in support of its claim that the Legislature can change the rule of law in issues raised in cases pending before the state courts. While this could be construed as a response to ACC's Petition Against State Officer claim that SSB 5787 violates the doctrine of separation of powers, it does not address the fundamental mootness issue, nor does it address ACC's claims that SSB 5787 is in conflict with the CWA and impermissible special legislation.

⁵⁴ *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (RAP 10.3(a)(5) requires parties to provide argument in support of issues presented for review, together with citations to legal authority); *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991) (in the absence of argument and citation to authority, an issue raised on appeal will not be considered); *Oregon Mutual Insurance Company v. George Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (Div. 3 2001) (If no authority is cited, we may presume that counsel, after diligent search, has found none); *Concerned Taxpayers v. Department of Transportation*, 90 Wn. App. 225, 234, 951 P.2d 812 (Div. 2 1998) (Appellate Court need not consider issues that are not supported by argument or authority).

and CASE with no opportunity to reply to arguments the Port and Ecology will undoubtedly offer when all parties submit their simultaneous Reply briefs. The Court should not permit such gamesmanship.

3. Legislative History of SSB 5787

If the Court does consider the effect of SSB 5787, the legislative history is enlightening. While a few participants attempted a pretense that the legislation was to address a general concern, the legislative debate and hearings focused on the 3RW Project and in particular on the PCHB's disallowance of the Port's SPLP workplan to approve fill material. Of course, no member of the Legislature had attended the PCHB trial, had the complete PCHB trial transcripts, or had reviewed the complete 57,000-page PCHB record.⁵⁵ Indeed, public testimony in committee on an issue which had required in-depth adjudication by the PCHB was generally limited to two minutes per speaker.

Comments in the House Agricultural and Natural Resources Committee reflected both the Legislature's lack of understanding of the PCHB adjudication and the Clean Water Act, and frankly acknowledged

⁵⁵ Despite Port consultant Ms. Clark's admission (AR 056740-742 (Clark, Tr. at Day 9, pp. 9-0134, line 14, to 9-0136, line 5), cited above) concerning the shortcomings of the Port's SPLP process for keeping contaminated fill which should have been excluded from the Airport site, one of the Port's counsel even appeared before a legislative committee and testified with regard to the Port's Third Runway proposal that, "There are no documents that were in that 50- or 60,000 pages [PCHB record] that suggest that SPLP is an invalid or scientifically questionable process." Appendix 1-D (Partial Transcript of Senate Natural Resources, Energy & Water Committee, February 21, 2003, at p. 16).

that the Legislature was about to “overturn a ruling of the PCHB” under the federal Clean Water Act.⁵⁶

Before that same committee, Lawrence Molloy, a Port of Seattle Commissioner, acknowledged that the legislation was to preempt this Court’s review of the PCHB decision:

We are here because the PCHB established new fill dirt criteria. The Board’s criteria underwent no scientific review or analysis and is used nowhere by industry or government. The Port and Ecology are appealing the Board’s decision in court, but it could be many months before a hearing date is even scheduled. We need your action now so that the third runway can get moving without another year or more of delay. The bill before you deals with the reinstatement of a soils leaching procedure first stipulated by Ecology in its approval of the water quality certification for the third runway project and subsequently changed by the PCHB.⁵⁷

Eric Johnson, lobbyist for the Washington Public Ports Association, offered similar “analysis” before the Senate Natural Resources, Energy & Water Committee on February 21, 2003, of the PCHB adjudication:

Why are we here with this bill? Because as part of the appeal of the big project that shall remain nameless, the Pollution Control Hearings Board disallowed the use of this test [SPLP], this procedure, as a mechanism for predicting whether or not soils are going to leach and cause a water quality problem. This decision takes a tool away from the State that it needs to

⁵⁶ Appendix 1-E, Partial Transcript of House Agricultural and Natural Resources Committee, February 21, 2003, at p. 15, lines 13-19).

⁵⁷ Appendix 1-F (Partial Transcript of House Agricultural and Natural Resources Committee, February 26, 2003, at p. 28, lines 13-24 (emphasis added)); *see also id.* at p. 27, lines 20-24

predict whether or not you're going to violate water quality standards.⁵⁸

Comments in the House Agricultural and Natural Resources

Committee explicitly acknowledged the legislative purpose of SSB 5787 to alter the outcome of the PCHB adjudication and direct a result in this Court:

Rep. Rockefeller: Thank you, Madame Chair. Now, can you tell me the effect of the modification on any pending appeal that there may be relative to the use of standards that have been challenged?

Staff: The proposed substitute includes a ratification clause where it says that the Legislature ratifies [unintelligible] any requirement that was included in a previously issued water quality certification. As the members heard, there is an issue with a case that relates to the third runway project that is currently under appeal. Because that is still pending and the court has not ruled on it yet, the court would have to look to that language of the ratification and determine its application to that case. And in this situation it would apply -- it should apply -- the court should determine it would apply because it was a previously issued water quality certification that included a test that was in the MTCA regulations.

Chair: More questions?

Rep. Rockefeller: Thank you, Madame Chair. So we are in essence setting a legislative intent for the court, assuming that it goes to further judicial action?

Staff: The court would certainly look towards what the Legislature is doing and the direction that it is giving in terms of the ratifications, the actions were taken -- the ratification of the actions that were taken previously, yes.

⁵⁸ Appendix 1-D (Partial Transcript of Senate Natural Resources, Energy & Water Committee, February 21, 2003, p. 7, lines 4-11) (emphasis added).

Rep. Rockefeller: Thank you.⁵⁹

The intent of the bill to interfere with this Court's pending case was confirmed in another colloquy on April 1, 2003, before the House Agricultural and Natural Resources Committee, between Representative McDermott and staff:

REPRESENTATIVE McDERMOTT: Thank you, Madam Chair. My understanding is there are some constitutional limits as to the legislature interfering with pending court cases. Is that affected because this is on direct review to the state Supreme Court, a particular instance that this would apply to is on appeal to the Supreme Court?

CAROLEEN DINEEN: There is a case currently pending before the State Supreme Court regarding the third runway, and that -- that case is pending before the Supreme Court. It has not been heard yet. This bill includes -- the first piece of the bill is a general provision that would involve any water quality certification involved imported fill material. It does have a ratification and approval language that would -- that would address any previously-issued certification and fill work that's not done by June 1st, 2003. Those parameters would relate to the case that is currently pending before the Supreme Court, so that would be an issue that would be related to that case.⁶⁰

As a result of these frank admissions of purpose, Representative Rockefeller, who is a supporter of the Port's Third Runway Project, but who is also a member of the Washington State Bar, announced that he would vote against the bill, citing its interference with the judicial process:

⁵⁹ Appendix 1-G (Partial Transcript of House Agricultural and Natural Resources Committee, March 5, 2003, at pp. 3-4).

⁶⁰ Appendix 1-H (Partial Transcript of House Agricultural and Natural Resources Committee, April 1, 2003, at pp. 3-4).

REPRESENTATIVE ROCKEFELLER: Thank you very much, Mr. Speaker. Well, let me begin first by acknowledging my respect for the diligence and good faith of the chair of the agricultural committee, the good lady from the 42nd District, who is managing this floor debate and has brought this bill before us in the public interest. I wish that it were not necessary for me to oppose this bill, because I happen to think that expansion of the Sea-Tac Airport is a necessary step for us to take, but the question, as the previous speaker has suggested, is at what price, and for me there is a serious concern about the effects of this bill if we pass it, as I expect we will. I believe that enacting this legislation will lead to even greater public mistrust of government and, in fact, to more disrespect, and the reason I believe this is based on the fact that this bill will nonsuit take away the opportunity to be heard on the part of literally thousands of citizens who have followed the rules that prior legislatures have put into law to govern the manner in which they can be heard and have their concerns reviewed by an independent body and adjudicated. The law has given citizens who question the effects of proposed government action, in this case by a very powerful governmental entity, the Port of Seattle, an independent forum in which to be heard, have their evidence heard and considered and presented, and then have their arguments considered and weighed. And whether you agree with them or you don't, and I suspect many of us do not, they are, in fact, following the procedures that we have provided for them for the unbiased and careful resolution of conflict. Now, to overturn the basis of their appeal, which is what this legislation will do, make no mistake about it, an appeal which is now before the Supreme Court, which has agreed to take it on an expedited basis, which clearly indicates the court's intent to make an expedited decision, is a powerful message, I think, to our citizens everywhere, not just these citizens who are waiting for their day in court, that it makes no sense to abide by the rules that we have set for them as citizens when they challenge the actions of government. And is that the note on which we want to go home? When we started this session, we acknowledged the widespread cynicism and mistrust of citizens about government, and we set about in a bipartisan manner.⁶¹

⁶¹ Appendix 1-I (Partial Transcript of House Floor Session, April 18, 2003, at pp. 19-21). Another legislator, otherwise uninvolved in the Third Runway controversy, pointed out that the Bill overturned the State's system of justice which depended on "this body making laws, and another body interpreting them":

Such admonitions went unheeded. As ultimately approved by the Legislature and signed by the Governor, the Port's Bill explicitly includes a provision in which the Legislature purports to ratify and approve the very Ecology determination permitting Port use of the SPLP test which had been overturned by the PCHB, and which is now pending before this Court:

Any such requirement imposed by the department in a water quality certification or administrative order issued prior to the effective date of this section is ratified and approved by the legislature.⁶²

There can be no question that the Bill, including particularly this retroactive ratification language, was adopted expressly to revive the Ecology Certification which the PCHB had modified, because it was known at the time that it was the only certification affected by the Bill at all. As Ecology, through Ann Kenny, admitted in a Public Disclosure Act (RCW 42.17.250, *et seq.*) response on behalf of Ecology, "the only 401

REPRESENTATIVE DARNEILLE: Thank you, Mr. Speaker, sorry about that technical glitch there. Aristotle said: It is in justice that the ordering of society is centered. And, quite frankly, I'm really most concerned about this debate tonight because I feel justice is being questioned, and justice may be denied. We have a system of checks and balances in our state and in every 50 -- all 50 states across our nation. It involves this body making laws, and another body interpreting them. What we have here today is a bill that will circumvent a process well underway for the courts to decide on justice, and I wonder if we really want to make this a practice of this body, because we may want to quickly now, in the waning week of this session, to pass laws that will influence Breckenridge versus Valley General or Westby versus Gorsuch (ph.) or the -- any of the other 15 cases are pending before the Supreme Court of this state. I encourage you to vote no.

Appendix 1-I (Partial Transcript of House Floor Session, April 18, 2003, at pp. 28-29) (emphasis added).

⁶² Appendix 1-J (Laws of Washington 2003, Chapter 210 (Substitute Senate Bill No. 5787), signed by the Governor on May 9, 2003) (emphasis added).

Certification [Ecology has] issued that allowed the SPLP test was the one issued to the Port of Seattle on September 21, 2001.”⁶³

4. **SSB 5787 Attempts to Adjudicate Whether in a Particular Circumstance a Particular Testing Procedure Will Be Appropriate, Directing the Outcome of a Pending Case in Violation of Constitutional Principles of Separation of Powers**

If the Court considers the merits of respondents’ mootness claims, it should hold that its application to the Third Runway project would violate the doctrine of separation of powers in our State Constitution:

The judicial power of the state shall be vested in a Supreme Court, Superior Courts, justices of the peace, and such inferior courts as the Legislature may provide.

Const. art. IV, § 1. Under this doctrine, the Legislature is precluded from making judicial determinations. *Tacoma v. O’Brien*, 85 Wn.2d 266, 271, 534 P.2d 114 (1975) (Legislature may not make a determination that “involves an interpretive process or function which, in the final legal analysis, under our system of government, is reposed in the judicial branch”); *see also Sofie v. Fibreboard*, 112 Wn.2d 636, 654, 771 P.2d 711 (1989). This Court provided in *Tacoma* examples of impermissible legislative intrusion into the judicial function:

Courts from other jurisdictions have declared that the legislature cannot determine the existence of liability under insurance policies, *State Farm Mut. Auto. Ins. Co. v. Christensen*, 88 Nev. 160, 494 P.2d 552 (1972); cannot declare conclusively what constitutes “adulterated food,” *State v. A.J. Bayless Mkts., Inc.*, 88

⁶³ AR 057065-066 (03/10/03 Email from Ann Kenny), admitted by stipulation of the parties.

Ariz. 193, 342 P.2d 1088 (1959); cannot interpret provisions of a will, *Hartford v. Larrabee Fund Ass'n*, 161 Conn. 312, 288 A.2d 71 (1971); cannot determine whether a particular use of property is “charitable,” *People ex. rel. Nordlund v. Association of Winnebago Home*, 40 Ill. 2d 91, 237 N.E.2d 533 (1968); cannot determine what constitutes “just compensation,” *State Plant Bd. v. Smith*, 110 So. 2d 401 (Fla. 1959); *Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 269 N.E.2d 895, 321 N.Y.S.2d 345 (1971); cannot determine legal liability in a tort case, *Koehler v. Massell*, 229 Ga. 359, 191 S.E.2d 830 (1972); and cannot determine who is entitled to office in a disputed election, *State ex. rel. Worrell v. Carr*, 129 Ind. 44, 28 N.E. 88 (1891).

Id. at 271-272. As the Court explained:

All these cases involved the element of adjudication, and we believe a finding of “economic impossibility” is similarly adjudicatory ... finding that existing contracts, entered into at least six months prior to the legislation, have become economically impossible to perform, however, is a legal conclusion, a result which follows from examination and consideration of circumstances in a particular case and interpretation and application of legal principles to those facts.

Id. at 272 (emphasis added).

Just as the Legislature was precluded from finding that existing contracts, entered into six months prior to new legislation, had become economically impossible to perform, the Legislature is similarly precluded here from legislating that a particular test procedure, such as the SPLP test, is capable of meeting the reasonable assurance standard of the Clean Water Act, in the specific circumstances of § 401 certification for the 3RW Project. CWA §401 provides in pertinent part that:

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a federal

license or permit will comply with any applicable effluent limitations and other limitations, under § 1311 or 1312 of this title, standard of performance under § 1316 of this title, or prohibition, effluent standard, or pretreatment standard under § 1317 of this section, and with any other appropriate requirement of state law ...

CWA § 401(d); 33 U.S.C. §1341(d) (emphasis added). In deciding that this standard was not met if the Third Runway project were permitted to use the SPLP workplan proposed by the Port, the PCHB necessarily examined the particular circumstances of the case and applied the Clean Water Act § 401 legal standard to the circumstances reflected in its 57,000-page record.

For example, the PCHB considered whether the Port’s SPLP workplan as laid out in the § 401 Certification could address the complete set of water quality standards which applied under § 401.⁶⁴ The PCHB also considered the number of samples to be utilized under the Port’s SPLP workplan. *Id.* Further, the PCHB considered the SPLP workplan’s detection limits. *Id.* Thus, the question of whether or not use of the Port’s SPLP workplan meets the CWA § 401 standard is wholly adjudicatory in nature. “A legislative attempt to make such an adjudication violates the separation of powers doctrine and is void.” *Tacoma, supra*, at 272.

Under the doctrine of separation of powers, a legislative body may not determine the rule of decision in a particular case, nor otherwise unduly impact judicial power to decide pending cases. *United States v. Klein*, 80 U.S. 128, 146-47, 20 L.Ed. 519 (1871)). Here, it cannot be disputed that the intent of SSB 5787 is to change the rule of decision in the

⁶⁴ AR 000838 (PCHB Order at 65).

ACC appeal of the § 401 Certification for the third runway project, as the legislative history is filled with such acknowledgements.⁶⁵

Relying upon *Klein*, the Western District of Washington has admonished that a legislative intent to “chang[e] the rule entitling plaintiffs to relief” in a pending case was, in and of itself, a violation of the doctrine of separation of powers. *In re Washington Public Power Supply System Sec. Litig.*, 673 F.Supp. 411, 415-418 (W. D. Wash. 1987), *vacated on other grounds*, 1988 U.S. Dist. LEXIS 16536 (W.D. Wash. 1988). In that case, the Washington Legislature amended section .430 the Washington State Securities Act (Ch. 21.20 RCW) to raise retroactively the standard of fault applicable to municipal entities (the “scienter amendment”) while litigation was pending to determine the obligations of various public entities to repay Washington Public Power Supply bonds. In finding the amendment unconstitutional, the court stated:

The legislative history leaves no room for doubt that the Washington Legislature intended this amendment to benefit the state’s ratepayers by changing the rule entitling plaintiffs to relief, not by changing the remedy.

Id. Thus, the Court concluded:

In *United States v. Klein* ... the United States Supreme Court refused to permit undue legislative interference in the judicial process. It is no more permissible for the Washington Legislature to engage in such tampering with the judicial branch than it is for the Congress of the United States. The 1986 amendment

⁶⁵ For example, it was acknowledged in legislative committee that the bill would “overturn a ruling of the PCHB.” Appendix 1-E (Partial Transcript of House Agricultural and Natural Resources Committee, February 21, 2003, at p. 15, lines 13-19).

represents an attempt by the Washington Legislature to protect its constituents from the consequences of pending litigation. That is an unconstitutional intrusion on the judicial responsibility to resolve cases and controversies. The 1986 amendment, RCW 21.20.430(7), is violative of separation of powers and constitutionally void as it applies to this litigation.

Id. at 417.

This Court later reached a different conclusion on the constitutionality of the scienter amendment, in *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 143-144, 744 P.2d 1032 (1987), because it construed the amendment as not deciding a factual issue or affect a decision already adjudicated: “The Legislature’s retroactive amendment of RCW 21.20.430 does not impede upon the Court’s right and duty to apply new law to the facts of this case. It does not dictate how the court should decide a factual issue nor does it affect a final judgment.”

Id. at 144.

By contrast, here, in “ratifying and approving” use of the SPLP test for the Third Runway § 401 Certification, the Legislature is both deciding a factual issue (whether the SPLP test in the context of the Third Runway proposal will protect against deposit of polluted fill in watersheds protected under the federal Clean Water Act) and changing the rule of decision in a case already adjudicated by the PCHB and before this Court on record review.

The rule in *Klein* prohibiting such invasion of the judicial process was applied by the Arizona Supreme Court in *San Carlos Apache Tribe v. The Superior Court of Arizona*, 972 P.2d 179 (1999). In that case, several

parties challenged the constitutionality of legislation affecting the adjudication of surface water rights in Arizona. One of the new statutory provisions provided for “summary adjudication of certain statutorily defined de minimis uses.” *Id.* at 211. However, under prior law, “the water master previously could find different de minimis standards for particular watersheds. The master’s findings of fact were made after contested hearings in which the parties were able to present evidence on the de minimis issue.” *Id.*

In holding that the de minimis use statute violated the doctrine of separation of powers as expressed in Article III of the Arizona constitution, the court explained that:

This statute directs the DWR and the Courts to decree de minimis use based on a bright-line, legislative standard. No provision exists for the presentation of evidence regarding what would be a true de minimis use given the amount of water actually available ... As Judge Bolton noted, ‘the legislature is in no position to determine the amount of water that is de minimis for domestic, business, stockpond and stock watering uses in numerous [and vastly differing] watersheds throughout the state.’ This conclusion, she held, must be made after determining contested facts and applying the law to those facts, which is strictly a judicial function. We agree.

Id. at 212 (brackets in original).

Thus, the Arizona Supreme Court concluded that “the practical effect of the enactment, however, was to remove all possibility of meaningful judicial conclusions based on findings of fact. This the legislature cannot do.” *Id.* (citing *Klein, supra*) . Just as the Arizona

Legislature could not adopt a bright-line standard for decreeing de minimis use, the Washington Legislature cannot retroactively adopt a bright-line rule decreeing that use of the SPLP test in all circumstances meets the reasonable assurance standard under CWA § 401.

5. **SSB 5787 Attempts to Exempt a Portion of the Third Runway Project from Review under the Federal Clean Water Act § 401, in Conflict with Its Mandate**

The Legislature's effort to require use of the Port's SPLP workplan, which, in the context of the 3RW Project, has been held by the PCHB not to meet the CWA § 401 standard, is barred by the doctrine of federal preemption, based in the Supremacy Clause of the United States Constitution. U.S. CONST. art VI, cl. 2. Federal law can preempt state law in two ways: field preemption or conflict preemption. *Inlandboatmen's Union of the Pacific v. Department of Transportation*, 119 Wn.2d 697, 701, 836 P.2d 823, 826 (1992). If Congress intends to occupy a given field, state law falling within that field is preempted. *Id.* Even if Congress has not occupied the entire field of regulation, federal law preempts state law when state law conflicts with federal law and: (1) compliance with both laws is physically impossible; or (2) state law hinders accomplishment of the federal law. *Id.* at 702 and 828. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *All-Pure Chem. Co. v. White*, 127 Wn.2d 1, 6, 896 P.2d 697, 700 (1995).

The procedures and substance of state water quality law must meet the minimum standards of and are governed by the requirements of the federal Water Pollution Control Act. CWA § 401 requires states to “establish procedures for public notice in the case of all applications for certification by it, and to the extent it deems appropriate, procedures for public hearings in connection with specific applications,” and further requires a determination as to whether a § 401 Certification sets appropriate “effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a federal license or permit will comply with any applicable effluent limitations and other limitations . . . and with any other appropriate requirement of state law set forth in such certification ...” CWA § 401(a) and (d); 33 U.S.C. § 1341(a) and (d). Further, the implementing regulations for the Clean Water Act require that certifications be based on: “reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards.” 40 C.F.R. § 121.2(3).

The framework of laws enacted by Washington to comply with the federal CWA’s mandate expressly gives the PCHB final review of Ecology CWA § 401 certifications.⁶⁶ By statutory mandate the PCHB is made up of “members qualified by experience or training in pertinent matters pertaining to the environment ...” RCW 43.21B.020. The PCHB

⁶⁶ The applicable statute provides that, “The purpose of the Pollution Control Hearings Board is to provide for a more expeditious and efficient disposition of appeals with respect to decisions and orders of the Department ...” RCW 43.21B.010.

itself reaffirms in its decision here its pivotal statutory role in implementing the CWA on Washington's behalf:

Pursuant to RCW 43.21B.110, this Board has jurisdiction to decide appeals of §401 certifications issued by the Department of Ecology. This appeal process is an integral part of the State of Washington water pollution control laws. *Friends of the Earth*, PCHB No. 87-64, Dissent at IX. The Board conducts its review of Ecology's §401 certifications with an eye toward furthering the stated objectives of the Clean Water Act, 33 U.S.C. § 1251, *et. seq.*, and the State of Washington Water Pollution Control Act, RCW 90.48.010 *et. seq.*⁶⁷

As applied to the § 401 Certification for the 3RW Project, SSB 5787 conflicts with and is preempted by CWA § 401 because it purports to unilaterally usurp this statutory role of the PCHB -- and, in turn, this Court, claiming to have "ratified and approved" the very provision of the Ecology § 401 Certification that the Board held was not in compliance with the CWA.

In fact, the Bill purports to require acceptance as valid of a § 401 Certification that the PCHB could only affirm by **expressly conditioning** it on a prohibition barring use of the Port's proposed SPLP workplan:

Based on the Findings of Fact and Conclusions of Law above, the Board Concludes, Ecology's issuance of the § 401 certification, with the imposition of the conditions in the § 401 certification and with the conditions imposed by this Board, provide reasonable assurance that state water quality standards will be met.⁶⁸

⁶⁷ AR 000874 (PCHB Decision at 101) (emphasis added).

⁶⁸ AR 000 908 (PCHB Decision at p. 135) (emphasis added); *see also* AR PCHB Decision at p. 138 (AR 000911).

Thus, if the Court concludes that SSB 5787 permits the Port to use the SPLP workplan and “moots” PCHB Condition 8 barring its use, then the Legislature will have only succeeded in removing a fundamental premise upon which the Board’s “reasonable assurance” determination was based. Accordingly, if SSB 5787 were given effect, there would no longer be “reasonable assurance” that the Port’s project complied with all state water quality standards, and the Board’s Certification Order explicitly based on Condition 8 would become null and void.

States have the primary responsibility under the CWA to “prevent, reduce, and eliminate pollution, to plan the development and use ... of land and water resources...” 33 U.S.C. § 1251 The CWA’s anti-degradation provisions in § 303 (33 U.S.C § 1343) require that state standards prevent degradation of state waters. Pursuant to this mandate, the State’s overarching water quality antidegradation policy provides: “Existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed.” WAC 173-201A-070(1). Under the Act, each state must develop state water quality standards and assure compliance with them to meet the anti-degradation mandate. 33 U.S.C. § 1313.

Further, pursuant to CWA § 401, the state must certify compliance of a project with state water quality standards. There is no authority to exempt parts of certain projects from compliance with the federal requirement. *Northern Plains Resource Council v. Fidelity Exploration*

and Dev. Co., 325 F.3d 1155 (9th Cir. 2003) (Montana state law cannot exempt coal bed methane water from being subject to the Clean Water Act when the Act does not provide the state the authority to create such an exemption.).⁶⁹ In *Northern Plains*, the 9th Circuit explained that “only congress may amend the CWA to create exemptions from regulation.” *Id.* at 1164. Similarly, the Washington Legislature cannot circumvent the CWA § 401 certification process by enacting inconsistent legislation.

Yet, if SSB 5787 is given effect in the manner suggested by respondents, it would violate federal law by effectively mandating certification where reasonable assurance did not exist.⁷⁰

The PCHB found that, for there to be reasonable assurance that the Third Runway Project would comply with applicable water quality standards, including the anti-degradation law, there must be reasonable assurance that surface water runoff from the embankment and water flowing through and out of the drainage layer will not degrade the Class AA ratings of Des Moines, Miller and Walker Creeks and will not result in violation of Washington’s toxic substances water quality standard. The PCHB found based on testimony and evidence before it that use of the Port’s SPLP workplan would preclude such reasonable assurance.

⁶⁹ *Accord, Rivers Unlimited, Inc. v. Schregardus*, 86 Ohio Misc. 2d 78, 685 N.E.2d 603 (1997) (Ohio’s statute that allows allocation of up to eighty percent of a waterway’s pollutant assimilative capacity to existing sources without antidegradation review conflicts with the Clean Water Act, violates the Supremacy Clause and is invalid.).

⁷⁰ It would do so by, *inter alia*, allowing the degradation of state waters up to the SPLP’s reporting limit, which, as the PCHB found, frequently exceeds state water quality limits for toxic substances established under WAC 173-201A-040. PCHB Decision at pp. 65-66.

In light of this determination, which has not been overturned by any duly authorized appellate body, SSB 5787 can have no “mooting” effect on the PCHB decision.

6. **The Retroactive Application of SSB 5787 Applies Only to the Port’s Third Runway Project, Granting a Special Privilege to the Port in Violation of the State Constitutional Prohibition on Special Legislation**

Article II, § 28 of the Washington Constitution provides:

The Legislature is prohibited from enacting any private or special laws in the following cases . . . (6) for granting corporate powers or privileges . . . (12) legalizing, except as against the state, the unauthorized or invalid act of any officer . . . [and] (17) for limitation of civil or criminal actions.

Art. II, § 28(6), (12), (17).

Here, allowing the retroactive application of SSB 5787 to the 3RW Project would create a special privilege for the Port, a municipal corporation,⁷¹ allowing it to have a portion of its § 401 Certification adjudicated by the Legislature in violation of subsection 6 of Article II, § 28. The Bill would violate subsection 12 by purporting to make legal the Port’s use of the SPLP workplan prohibited by the PCHB. Finally, SSB 5787 would violate subsection 17 by retroactively limiting what

⁷¹ *Automobile Drivers & Demonstrators Union Local No. 882 v. Department of Retirement Systems*, 92 Wn.2d 415, 419, 598 P.2d 379, (1979) (“It is clear that the Port [of Seattle] is a municipal corporation. The Legislature has explicitly described port districts as “municipal corporations.” RCW 53.04.060. See also *Port of Seattle v. International Longshoremen’s & Warehousemen’s Union*, 52 Wn.2d 317, 324 P.2d 1099 (1958).)

would otherwise be ACC/CASE's rights to judicial review of Ecology's CWA § 401 Certification under the State APA.

No matter what subsection is invoked, this Court has explained that "Special legislation is legislation which operates upon a single person or entity while general legislation operates upon all things or people within a class." *Brower v. State*, 137 Wn.2d 44, 60, 969 P.2d 42 (1998) (citations omitted). To survive a challenge as special legislation, "any exclusions from a statute's applicability, as well as the statute itself, must be rationally related to the purpose of the statute." *Brower*, 137 Wn.2d at 60. Here, no rational basis exists to give SSB 5787 retroactive effect, except for an impermissible one -- namely, precluding review by this Court of the PCHB's decision to prohibit the use of the SPLP test for the importation of fill material for the 3RW Project.

This Court was faced with a similar situation in *City of Seattle v. State*, 103 Wn.2d 663, 694 P.2d 641 (1985). In that case, Seattle sought to annex property known as the South Park/Duwamish area. *Id.* at 665. The City's attempt was abandoned after the 1979 Legislature passed RCW 36.93.180(10), which required a boundary review board to provide:

reasonable assurance that the extension of municipal services and the additional payments to be made by the property owners of the area to be annexed in the form of taxes bears a reasonable relationship to the value of the additional municipal services to be received.

Id. at 666 (emphasis added). This additional criterion applied:

only to annexations by cities with a population of over 400,000 and only when an annexation is initiated by city resolution. Seattle is the only city in the state with a population over 400,000.

Id. .

In ruling that the proposed amendment to RCW 36.93.180(10) was invalid special legislation, this Court explained:

While we were unable to find any indication of why the Legislature chose to differentiate between cities with a population of more or less than 400,000, we did find indications that this legislation was passed with this particular annexation in mind ... This reinforces our conviction that RCW 36.93.180(10) is special legislation and therefore invalid.

Id. at 677.

Here, Ecology itself advised at the time the legislation was pending that “the only 401 Certification [Ecology has] issued that allowed the SPLP test was the one issued to the Port of Seattle on September 21, 2001.”⁷² No rational basis is provided for SSB 5787’s sole retroactive effect on the PCHB’s 3RW decision. Accordingly, SSB 5787 is invalid as special legislation.

D. The Board Appropriately Limited Use of a Site-Specific Study to Increase the Water Quality Criteria Governing Discharges of Toxic Metals at Sea-Tac Airport

Under Ecology's standard permitting approach, all dischargers are required to comply with "technology-based effluent limits." Then, if a “reasonable potential analysis” indicates that the discharges will still cause violations of water quality standards despite the technology based limits, it

⁷² AR 057065-066 (Third Runway Project only beneficiary of retroactive application).

imposes "water quality-based effluent limits."⁷³ AR 032705. Here, Ecology had reason to believe when writing its § 401 Certification that the Port could not meet water quality-based effluent limits tied to the State's existing water quality standards ("WQS").⁷⁴ AR 000881 (PCHB Order, p. 108). Ecology's "solution" was to insert into the § 401 Certification Condition J.2.a (AR 016916), a provision leapfrogging to a change in the water quality standards specially for the Port through use of a "site-specific study."

To its credit, the Board wasn't willing to play along. It knew that Ecology was standing the permitting process (applicable to every other applicant, developer, etc., in the state) on its head to accommodate the Port, and in doing so was undercutting the CWA § 401 requirement for assurance that a project would not violate state WQS. While the Board was unwilling to deny the § 401 outright, it did what it could to protect the

⁷³ "Permits must incorporate technology-based controls, i.e., limitations based on the degree of effluent control which can be achieved by point sources using various levels of pollution control technology. See §§ 301, 304, 33 U.S.C. §§ 1311, 1314. See also *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 126-36, 51 L. Ed. 2d 204, 97 S. Ct. 965 (1977). In addition to technology-based controls, permits must contain any more stringent limitations that are necessary to meet water quality standards developed by the states pursuant to § 303. 33 U.S.C. § 1313."

Westvaco Corp. v. United States EPA, 899 F.2d 1383, 1384, 20 ELR 20816 (4th Cir. 1990). These concepts will be explained in greater detail below.

⁷⁴ Ecology was aware of it because of the Reasonable Potential Analysis (AR 024692-696); the 1998 letter from Ecology's AG to the Port (AR 028388), the Port's Preliminary Comprehensive Stormwater Management Plan (AR 024711, 024728-729), the 1997 Surface Water Receiving Environment Monitoring Report (AR 022310, 022344, 022346-348); and the data contained in the Annual Stormwater Monitoring Reports (e.g., AR 022740, 022744).

local creeks by prohibiting Ecology from using the site specific study to raise the limits on pollution in the water quality criteria.

The Port and Ecology now challenge the portions of the Board's Order⁷⁵ which reject the Port's use of such site-specific studies, called "WER" (water effects ratio) studies, to increase the amount of toxic metals it may discharge into local streams.⁷⁶ As it stands now, the practical effect of the Board's Order is that the Port will have to comply with the same water quality criteria for toxic metals that apply to everyone else. *See* WAC 173-201A-040. On the other hand, the construction of Washington's water quality standards urged by Ecology and the Port would allow dramatic increases in the amount of copper and other toxic metals the 3RW and new taxiways can legally discharge, via stormwater, into local creeks.⁷⁷

1. Background

a. The Clean Water Act Emphasizes Control of Toxic Pollutants

Among other important objectives, the Clean Water Act declares:

⁷⁵ AR 000809-812, 885-86 (PCHB Order at 36-39, 112-113).

⁷⁶ The Port's airfield runways are a source area for copper in the Port's stormwater discharges. AR 028485 (Fitzpatrick Dep. at 94). Stormwater runoff from the runways includes elevated levels of copper. AR 028485 (Fitzpatrick Dep. at 94); AR 017223 (NPDES Composite Statistics for "Airfield" Outfalls.) The copper may be originating from aircraft tires. AR 000800 (PCHB Order at 27); AR 028485, 486-487 (Fitzpatrick Dep. at 95, 100-101). The Port's own toxic metals screening tests disclosed that copper and zinc are the metals of concern for the airport's stormwater discharges. AR 000812 (PCHB Order at 39).

⁷⁷ The Port cites the results of a "range-finding WER" for copper. *See* Port Br. at 16. These results, the Port suggests, show that the local creeks can be abused by discharge of as much as 28 times more copper than the statewide standard allows. Port Br. at 16-17.

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985; [and]

* * *

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited[.]

CWA § 101(a), 33 U.S.C. § 1251(a).⁷⁸

Copper and zinc are toxic pollutants.⁷⁹ See 40 CFR 401.15; WAC 173-201A-040.⁸⁰

Congress amended the Clean Water Act in 1977, 1981, and 1987.⁸¹ According to Ecology, "The major philosophical change in these latest amendments is a greater emphasis on water quality-based permitting for toxic pollutants."⁸² The CWA requires only one class of water quality criteria to be rendered in numerical form -- "those governing 'toxic pollutants listed pursuant to section 1317(a)(1)[.]'"⁸³

⁷⁸ As defined in the CWA, the term "toxic pollutant":

means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

CWA § 502(13), 33 U.S.C. § 1362(13).

⁷⁹ The Board found that metals of concern at STIA include copper and zinc. AR 000800 (PCHB Order at 27).

⁸⁰ Toxic pollutants designated pursuant to CWA § 307(a)(1), 33 U.S.C. § 1317(a)(1), are listed in 40 CFR 401.15. In Washington's water quality standards, "toxic substances" are listed in WAC 173-201A-040.

⁸¹ AR 032700 (Dept. of Ecology, Water Quality Program Permit Writer's Manual, Pub. 92-109, p. I-6).

⁸² AR 032700 (Permit Writer's Manual, p. I-6).

⁸³ *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 716, 114 S. Ct. 1900, 128 L. Ed. 2d 716 (1994), quoting 33 U.S.C. § 1313(c)(2)(B); 40 CFR § 131.11(b)(2). Washington state's numerical criteria for toxic pollutants are listed in WAC 173-201A-040.

The CWA controls water pollution through the use of water quality standards.⁸⁴ Water quality standards consist of designated uses, narrative and numeric water quality criteria, and the antidegradation policy.⁸⁵ Specific conditions designed to assure compliance with water quality standards may be set forth in CWA § 401 Certifications, or in CWA § 402 (“NPDES”) permits.

b. Technology and Water Quality Based Controls

To assure compliance with water quality standards, the Clean Water Act requires the imposition of both technology-based standards ("best practicable control technology currently available"), 33 U.S.C. § 1311(b)(1)(A), and, where necessary to meet water quality standards, water quality-based controls ("any more stringent limitation, including those necessary to meet water quality standards"). 33 U.S.C. § 1311(b)(1)(C). *See also*, 33 U.S.C. § 1312(a).

The same fundamental requirement -- that is, the requirement to implement technology-based controls *and* any more stringent limitations necessary to meet water quality standards -- applies to Water Quality Certifications issued under CWA section 401.⁸⁶ 33 U.S.C. § 1341(a). As the U.S. Supreme Court explained:

⁸⁴ *See* CASE's Opening Brief at 16-18.

⁸⁵ *Id.* at 16.

⁸⁶ Ecology previously acknowledged this legal requirement. In a 1998 letter to the Port concerning the first 401 Certification for the third runway, which the Port appealed and Ecology subsequently withdrew (AR 008537 (08/23/01 ACC Notice of Appeal, p. 13)), Ecology stated:

The Clean Water Act requires that all discharges to waters of the United States apply Best Conventional Treatment Technology (BCT) and Best Available

§ 401 requires an applicant for a federal license or permit to conduct any activity "which may result in any discharge into the navigable waters" to obtain from the State a certification "that any such discharge will comply with the applicable provisions of sections [1311, 1312, 1313, 1316, and 1317 of this title]." 33 U.S.C. § 1341(a). Section 401(d) further provides that "any certification ... shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant ... will comply with any applicable effluent limitations and other limitations, under section [1311 or 1312 of this title] ... and with any other appropriate requirement of State law set forth in such certification." 33 U.S.C. § 1341(d).

PUD No. 1, supra, 511 U.S. 700, 707-08. The "more stringent limits" necessary to prevent violations of water quality standards are called "water quality based effluent limits."⁸⁷

As Ecology's Permit Writer's Manual explains:

The 1987 CWA and subsequent regulation clarified an earlier principle of the CWA. The principle is that if there is determined, by scientifically valid methods, to be a potential for the violation of the water quality standards from a discharge, then that discharge must receive effluent limits. The effluent limits are to assure the effluent does not cause a violation of the water quality standards. The law does not require 100% certainty but requires a judgment of reasonable potential based on a rational process in order to impose limitations.⁸⁸

Treatment Technology (BAT), and meet the state's water quality standards. State law requires that all discharges apply AKART and meet the water quality standards.

AR 028392 (09/10/98 Letter from Ecology to Port) (emphasis in original).

⁸⁷ AR 032694 (Permit Writer's Manual, p. G-16).

⁸⁸ AR 032701 (*id.* at p. I-7). Ecology's Manual subsequently reiterates, "The permit writer should keep in mind that the requirement for imposing effluent limitations for the protection of water quality does not require a demonstration of impact beyond any doubt but only that there is a determination of reasonable potential determined by a rational and scientific process." AR 032857 (*id.* at p. VI-1).

c. Ecology's Standard Approach to Assuring Compliance with Water Quality Standards

Over the years, Ecology has developed a methodical, comprehensive approach to writing permits under the CWA. The basic approach described in Ecology's Manual includes: (1) reviewing the application and supporting materials; (2) deriving technology-based effluent limits; (3) determining whether the effluent will cause violations of water quality standards despite the technology-based limits; (4) if so, deriving the water quality-based effluent limits necessary to meet water quality criteria; (5) deriving monitoring requirements and other special conditions; and (6) completing the public review process.⁸⁹ Of course, the actual process is considerably more complex, and each of these step includes several component steps.⁹⁰

For example, the third step described above -- determining whether discharges will violate water quality standards despite technology-based limits -- is called "determining reasonable potential" (to violate) or making a "reasonable potential determination."⁹¹ As described by Ecology, this step involves: (1) calculating background water quality; (2) calculating ambient water quality criteria; (3) calculating the maximum expected

⁸⁹ See Appendix 3, which includes AR 032705, the Permit Writer's Manual flow chart depicting the "Overview of the major components of the permitting process for all dischargers." See also AR 032704 (Permit Writer's Manual, p. II-2).

⁹⁰ The process is illustrated in greater detail in a two-page flow chart called Figure II-2, "The permitting process for industrial dischargers." See Appendix 3, which includes AR 032705-706 (Permit Writer's Manual, pp. II-3 - 4).

⁹¹ E.g., AR 032883 (Permit Writer's Manual, p. VI-27), 032888 (*id.*, p. VI-32), 0322891 (*id.*, VI-35).

concentration of pollutant in the effluent; and (4) comparing the resulting figures.⁹²

A "water effects ratio" or WER process cannot come until after all the prior steps are completed, technology-based limits have been fully explored, and water quality-based effluent limits are derived.⁹³

2. The § 401 Ecology Certification Leapfrogged the Normal Approach to Controlling Toxic Pollutants

In its zeal to approve the § 401 Certification for the 3RW, Ecology jettisoned its standard approach. It inserted into the § 401 Certification -- which is supposed to be a certification that Ecology has in hand reasonable assurance that state water quality standards would not be violated -- a "condition" authorizing the Port to utilize the process (WER) used to generate "adjusted" water quality criteria.

Even if use of a WER were otherwise appropriate in a § 401 certification (as opposed to in the distinct CWA § 402 NPDES permit process), Ecology inserted it without first complying with the prerequisites set out in its Permit Writer's Manual. It did not first require all available technology-based controls (AKART) or technology-based effluent limits on the Port's stormwater discharges to prevent violation of water quality

⁹² AR 032891-892 (*id.*, pp. VI-35 - 36); *see also*, AR 032888-891 (*id.*, pp. VI-32-35).

⁹³ *See* AR 032896 (*id.*, p. VI-40), Figure VI-4, "Compliance with water quality-based effluent limits" (included in Appendix 3). *See also* AR 032892-893 (*id.*, pp. VI-36 - 37) (discussion of site-specific study in section 3.3.15 follows the derivation of water quality-based effluent limits in section 3.3.13).

criteria, and did not require water-quality based effluent limits.⁹⁴

Abundant record evidence indicates Ecology did so because it knew at the time of certification that the Port's stormwater discharges could not comply with state water quality standards. In other words, Ecology realized it would have to deny the Port's application for a § 401 Certification if it did not build a loophole into the Certification which might allow the Port to later alter the standards Ecology was certifying the Port could meet.

As the Board found on the basis of substantial evidence:

In late June of 1998, Ecology and Port staff conducted a Reasonable Potential Analysis to determine whether stormwater discharges from the proposed Third Runway had a reasonable potential to exceed water quality standards. Using data from Outfall SDS-3 to represent predicted runoff from the Third Runway, determining surface water quality criteria based on stated hardness values, and considering expected "removal efficiencies" of various BMPs [Best Management Practices], the Reasonable Potential Analysis predicted resulting "effluent pollutant concentrations." The Reasonable Potential Analysis predicted "Copper concentrations after treatment remained higher than the criteria."⁹⁵

This finding should have come as no surprise to either the Port or Ecology. The Port's 1998 NPDES Permit Fact Sheet candidly admits, "Assuming no mixing zone, the stormwater discharges from Sea-Tac

⁹⁴ As the Board found, there are also no numeric effluent limitations on stormwater discharges in the Port's NPDES permit. AR 000881 (PCHB Order at 116); AR 055823 (Fitzpatrick, Tr. at Day 5, p. 5-0062).

⁹⁵ AR 000799 (PCHB Order at 26). Respondents did not challenge the Board's findings. Unchallenged findings are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002), citing, *State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

Airport show reasonable potential to violate the water quality criteria for copper, lead, and zinc."⁹⁶ This is significant: the Port in fact has no approved mixing zone for stormwater discharges (AR 000796 (PCHB Order at 23)), and the Port, Ecology, and the Board all agree that the 3RW's stormwater quality would be comparable to discharges from the Airport in recent years. AR 000792 (PCHB Order at 19).

The Port's internal documents also confirmed that, without a WER and subsequent approval of an increase in state limits on toxic pollutants, its stormwater discharges are and will be in violation of water quality criteria for copper. After looking at the "best existing data" to determine whether the receiving waters of Miller and Des Moines Creek were in compliance with water quality standards for copper -- and determining that "[n]either stream is currently in compliance" -- a Port consultant wrote, "a WER of 2 or more for Des Moines and 4 or more for Miller (both of which seem like pretty reasonable bets) would get the receiving streams to 'compliance.'"⁹⁷ Another Port consultant calculated the reasonable potential to exceed water quality criteria ("WQC") in a September, 1999 memo.⁹⁸ The consultant considered ten different cases with different variables and reported:

⁹⁶ AR 018006 (NPDES Permit Fact Sheet, p. 29). *See also* AR 033719 (05/14/99 Email from Fitzpatrick to Luster, at p. 2) (Ecology staff expressing concerns, in 1999, about "defending a 401 approval of stormwater discharges that were shown to violate the standards" in a 1998 analysis "based on SeaTac data").

⁹⁷ AR 024560 (06/01/99 Email from Ludwa to Logan) (internal quotation marks in original.)

⁹⁸ AR 024681 (09/07/99 Memo from Dexter to Fendt).

[O]nly Case #10 resulted in all the predicted exceedance [sic] values being negative (i.e., the WQC was achieved). . . . The conclusion I have from these simulation results is that the WER is more important than either the volume for mixing or the flow detention amount in terms of achieving WQC compliance. A WER value of 3 or greater is needed for WQC compliance.⁹⁹

At trial before the Board, the Port's consultant Dr. Stubblefield testified, with respect to copper levels in Des Moines Creek, that a WER of 3 "would make it so that there were no longer an exceedance; in other words, the standard would be higher and the exceedance wouldn't exist."¹⁰⁰

In other words, the record was clear that the Port could not meet state WQS at the time of Ecology's certification, and that the Port had set its sights on getting those standards changed rather than adopting, for example, technological methods for meeting them. Faced with this, Ecology inserted a WER condition into its Certification, highlighting that it had ducked its legal duty under CWA § 401 to certify that it had in hand assurance that stormwater discharges from the 3RW would comply with water quality limits on toxic metals.¹⁰¹

3. The Board's Unchallenged Findings Concerning the Port's Continuing Failures in Testing and Monitoring Provided Background for Rejection of a WER

⁹⁹ AR 024685 (*id.* at p. 5) (emphasis added.)

¹⁰⁰ AR 056673 (Stubblefield, Tr. at Day 9, p. 9-0067).

¹⁰¹ The lack of any deadline in Ecology's § 401 Certification for the Port's submission of the site-specific study (AR 000810 (PCHB Order at 37); AR 016916 (§ 401 Cert. at p. 27)) would have also been a problem absent Board action. As written by Ecology, it would have allowed the 3RW to be built before a WER study was performed and reviewed.

Before it turned to the specific issue of the WER study,¹⁰² the Board made over ten pages of important findings¹⁰³ about the Port's sampling and monitoring program. The Board characterized the program as producing "at best, confusing and, at worst, inaccurate data."¹⁰⁴

The Board found that the Port's NPDES permit does not require the Port to generate any one of the four key types of data needed to determine compliance with the WQS' numeric criteria for copper and zinc.¹⁰⁵

In addition, the Board found that most of the Port's sampling locations are upgradient from receiving waters and, in many instances, upgradient from treatment.¹⁰⁶ As a result, the Board found the Port's monitoring locations do not help characterize the condition of the receiving water,¹⁰⁷ and the Port's sampling results are therefore indicative of neither the water quality of the stormwater discharges as they enter the receiving waters, nor the water quality in the receiving streams themselves.¹⁰⁸

¹⁰² AR 000809 (PCHB Order at 36).

¹⁰³ See AR 000797-807 (PCHB Order at 24-34).

¹⁰⁴ AR 000807 (PCHB Order at 34). Even Ecology was forced to concede at trial that it does not know whether the Port's stormwater discharges comply with water quality criteria. AR 055826 (Fitzpatrick, Tr. at Day 5, p. 5-0065); see also AR 028468, 471-472 (Fitzpatrick Dep. at 28, 40-41).

¹⁰⁵ AR 000797-798, 000800, 000806 (PCHB Order at 24-25, 27, 33). The Board specifically found that the Port's sampling program does not generate data on (1) receiving water hardness (AR 000800 (PCHB Order at 27)); (2) pollutant concentrations measured over the necessary length of time (AR 000806 (PCHB Order at 33)); (3) sampling conducted in the receiving waters (AR 000797-798 (PCHB Order at 24-25)); or (4) the dissolved fraction of metals. AR 000800 (PCHB Order at 27).

¹⁰⁶ AR 000797 (PCHB Order at p. 24, ll. 17-19); see also, AR 000798 (*id.* at p. 25, ll. 5-7).

¹⁰⁷ AR 000798 (PCHB Order at 25, ll. 1-2).

¹⁰⁸ AR 000798 (PCHB Order at 25, ll. 3-4).

In making these findings, the Board also evaluated substantial evidence from multiple sources indicating that the Port's stormwater discharges frequently include levels of copper and zinc exceeding the numeric water quality criteria for these toxic pollutants.¹⁰⁹ The Board also heard testimony that Ecology's Northwest Regional Office had recommended placing Miller or Des Moines Creek on the CWA section 303(d) list¹¹⁰ for non-attainment of water quality standards for copper.¹¹¹

It was with this background, including “the sampling concerns raised earlier,”¹¹² that the Board assessed Ecology’s Certification -- including the WER provision.

4. The Board's Findings and Conclusions Supporting Condition 5 Fully Satisfy All Applicable APA Standards

a. The Board Correctly Interpreted and Applied the Law

The Board properly concluded that allowing Ecology and the Port to later raise toxic pollutant limits above the state standard criteria which Ecology had certified the Port could meet would, "under the facts of this

¹⁰⁹ AR 000801-803, 806 (PCHB Order at 28-30, 33). These sources include the 1997 Stormwater Receiving Environment Monitoring Report confirming that metals concentrations in Miller and Des Moines Creeks "exceeded federal and state water quality criteria both above and below the Airport’s stormwater outfalls, and in the Airport's stormwater discharges" (AR 000801 (PCHB Order at 28) (emphasis added)); and the data contained in the Port's 2001 Annual Stormwater Monitoring Report, indicating that more than three-quarters of the sampled discharges from all outfalls at STIA exceed the Port-calculated acute freshwater criteria for copper. AR 000801 (PCHB Order at 28).

¹¹⁰ Section 303(d) of the Clean Water Act requires States to periodically prepare a list of all State surface waters for which beneficial uses of the water - such as for drinking, recreation, and aquatic habitat - are impaired by pollutants. Washington's 303(d) list was last updated in 1998.

¹¹¹ AR 055887-888 (Fitzpatrick, Tr. at Day 5, pp. 5-0127-128); *see also*, AR 000805 (PCHB Order at 32).

¹¹² AR 000812 (PCHB Order at 39).

case, . . . be contrary to the clear objectives of the state and federal water pollution laws of eliminating pollution to the nations waters from all discharges, including those of stormwater."¹¹³

In attacking the Board's decision, the Port and Ecology both cite WAC 173-201A-040(3) as the source of Ecology's authority to use a WER study to "adjust" metals criteria. (Ecology Br. at 24; Port Br. at 17). The Port also asserts that water quality criteria may be revised "to improve their accuracy." (Port Br. at 17). But neither acknowledges the important substantive limitation in the plain language of the rule they rely on:

(3) The following criteria shall be applied to all surface waters of the state of Washington for the protection of aquatic life. The department may revise the following criteria on a statewide or waterbody-specific basis as needed to protect aquatic life occurring in waters of the state and to increase the technical accuracy of the criteria being applied. * * *

WAC 173-201A-040(3) (emphasis added). This controlling water quality standard only authorizes Ecology to revise the criteria for toxic pollutants such as copper and zinc "as needed to protect aquatic life . . . and to increase the technical accuracy of the criteria[.]" WAC 173-201A-040(3) (emphasis added). The rule does not authorize Ecology to revise the criteria *either* to protect aquatic life *or* to make the criteria more accurate.¹¹⁴

¹¹³ AR 000886 (PCHB Order at 113).

¹¹⁴ As this Court recently explained, "Statutory phrases separated by the word 'and' generally should be construed in the conjunctive." *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 474 n. 94, 61 P.3d 1141 (2003), *citing* 1A Norman J. Singer, Statutes and Statutory Construction § 21:14, at 179-81 (6th ed. 2002). *See also, Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 856, 827 P.2d 1000 (1992) ("We thus read the 'and' as simply being an 'and'. The Legislature would have used the word 'or' if it had intended to

In any event, there was no evidence before the Board that "adjusting" (through increase of the numeric criteria limits for toxic pollutants) was "needed to protect aquatic life" in Miller or Des Moines Creeks. Nor was a case made to the Board that the WER provision was necessary to the § 401 Certification because of some problem with technical accuracy in the applicable water quality criteria. In fact, such a complaint by Ecology or the Port about any purported lack of technical "accuracy" in the numeric criteria for toxic substances in WAC 173-201A-040 would have been less than credible as a basis for prospectively authorizing a WER-based increase in pollutant limits. It was Ecology and the Port after all who claimed to the Board that they could not determine whether the Port's stormwater discharges were even complying with the applicable numeric criteria.¹¹⁵ In telling the Board that they could not determine the "1-hour average" pollutant concentrations needed to determine compliance with the "acute" criteria, or the "4-day average" pollutant concentrations needed to determine compliance with the "chronic" criteria (*see* AR 032858 (Permit Writer's Manual at p. VI-2)),¹¹⁶ they gave the Board no basis to

convey a disjunctive meaning. *See State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982) (where the lower court erred in reading an 'and' in former JCrR 4.10 as conveying a disjunctive meaning); *Childers v. Childers*, 89 Wn.2d 592, 596, 575 P.2d 201 (1978) (the word 'and' does not mean 'or').")

¹¹⁵ *See* AR 002886 (Fitzpatrick Prefiled Testimony at p. 6).

¹¹⁶ As Ecology's Permit Writer's Manual explains, the numeric criteria for toxic pollutants usually have three components: magnitude or concentration; a duration-averaging period for exposure to the chemical in question; and frequency -- the number of times that the criteria may be exceeded within a given time frame. AR 032858 (Permit Writer's Manual at p. VI-2). "Each of these components is defined for short-term (acute) and long-term (chronic or sublethal) effects." *Id.*, and *see*, WAC 173-201A-040 (Table, and notes "c" and "d.").

believe that their proposed WER study would increase the “technical accuracy” of the applicable limits.

Legislation must be interpreted consistent with its stated goals.¹¹⁷ Here, as the Board correctly observed, the paramount objective of state and federal water pollution laws is to eliminate pollution¹¹⁸ -- not to facilitate increased discharges of toxic pollutants.¹¹⁹

Ecology and the Port also had failed to satisfy other prerequisites to the use of a WER. For example, "The Permittee **must** have examined other options for reducing the concentration of metals in the effluent such as pollution prevention and treatment. This must be reported in the form of an engineering report as specified in Chapter 173-240 WAC."¹²⁰ No such report was identified to the Board as a basis for the Certification’s WER provision. In fact, the record reflects that the Port’s stormwater discharge was not meeting its existing technology-based requirements.¹²¹ For example, the Board found that the existing Best Management Practices (“BMPs”) in place at the Airport (considered “technology” by Ecology) -- filter strips and biofiltration swales -- are not effective in removing dissolved metals from stormwater.¹²² Yet, more aggressive

¹¹⁷ *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000), citing *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 140, 814 P.2d 629 (1991).

¹¹⁸ AR 000886 (PCHB Order at 113).

¹¹⁹ See CWA section 101(a)(1), 33 U.S.C. § 1251(a)(1) (stating national goal that the discharge of pollutants into navigable waters be eliminated); RCW 90.48.010 (proclaiming a public policy of working cooperatively with the federal government to extinguish the sources of water quality degradation).

¹²⁰ AR 033357 (Permit Writer’s Manual at App. 6-74) (emphasis in original).

¹²¹ AR 033358 (Permit Writer’s Manual at Appendix 6, sec. 12.1.e.).

¹²² AR 000798, 804-805 (PCHB Order at 25, 31-32).

technological measures had not been required. This unchallenged finding is a verity on appeal. *Robel, v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

Finally, any suggestion (*see, e.g.*, Ecology Br. at 24-5, 27-8.) that EPA's WER policy guidance provides authority to override the PCHB's determination is mistaken. EPA emphasizes that "it is the State in all cases that determines if derivation of a site-specific criterion based on the water-effect ratio is allowed" ¹²³ The Board's decision here is entirely consistent with the applicable regulations to the effect that such dispensation may only occur "to protect aquatic life . . . and to increase the technical accuracy of the criteria being applied" (WAC 173-201A-040(3) (emphasis added)) and therefore is entirely consistent with the EPA Guidance. ¹²⁴

b. The Board's Ruling Was Neither Arbitrary Nor Capricious

The Port and Ecology also both argue that the Board acted arbitrarily and capriciously in adopting Condition 5, citing the Board's reference to the difficulty of regulating stormwater and the multiple contributors to stormwater pollutants in the area streams. ¹²⁵ Throughout

¹²³ AR 037436 (August 1994 EPA Water Quality Standards Handbook, at p. 5).

¹²⁴ AR 037436 (August 1994 EPA Water Quality Standards Handbook, at p. 5). In addition, it bears noting that WAC 173-201A-040(3) also requires Ecology to undertake a formal rule-making process under the APA before adopting revised criteria for toxic pollutants. *See*, WAC 173-201A-040(3), *citing* Ch. 34.05 RCW; *see also*, RCW 34.05 Part III ("Rule-Making Procedures"). However, Section J.2.a of the 401 Certification (AR 016916) is worded so as to purport to dispense with the rule-making procedure. *See* AR 016916 (§ 401 Cert. at p. 27).

¹²⁵ Ecology Br. at 27-28; Port Br. at 19-20; AR 000886 (PCHB Order at 113).

the PCHB trial, Ecology's primary water quality specialist, Kevin Fitzpatrick, vehemently asserted it simply had not been possible to use Ecology's standard regulatory tools to evaluate the Port's stormwater discharges -- tools including determining time-averaged concentrations, undertaking a reasonable potential to exceed analysis, and imposing water quality-based effluent limits -- because stormwater is so difficult to regulate, and because it was so hard to separate the Port's discharges from other discharges into the receiving waters.¹²⁶ Indeed, Mr. Fitzpatrick went so far as to testify "it is extremely difficult, *if not impossible*, to apply the numeric water quality standards in WAC 173-201A to stormwater discharges."¹²⁷

Given this emphatic Ecology testimony, the Board was entitled to take the Port and Ecology's testimonials for the WER process with a sizeable grain of salt. On the one hand, Ecology professes to be unable to perform the basic task¹²⁸ of determining a one-hour average pollutant concentration for the Port's stormwater discharges, as needed to determine whether the Port is in compliance with acute criteria for copper, lead, and

¹²⁶ See, e.g., AR 002885-886 (Fitzpatrick Prefiled Testimony, pp. 5-6); 055801-802 (Fitzpatrick, Tr. at Day 5, pp. 5-0040-41). This point was important at trial because of the ACC and CASE contention that, if Ecology had cared to look, it would have seen that the Port was already in violation of WQS and therefore could not possibly be granted § 401 certification.

¹²⁷ AR 002886 (Fitzpatrick Prefiled Testimony, at p. 6) (emphasis added).

¹²⁸ See AR 024589 ("Monitoring of Stormwater Discharges to Determine Compliance with Surface Water Quality Standards"). The process of taking a one-hour composite sample for comparison with the acute standard is described in two sentences: "The discharger should collect one or more one-hour composite samples during the first few hours of a storm. The composite samples may be taken with a continuous sampler or as a combination of a minimum of three aliquots from three grab samples taken at least 15 minutes apart for each composite sample." AR 024592 (*id.* at 30).

zinc.¹²⁹ But on the other hand, the Board was asked to accept that the Ecology and the Port have mastered the sophisticated analytical capabilities necessary to perform a considerably more complex WER study for the purpose of protecting aquatic life and increasing technical accuracy.¹³⁰ Quite plainly, the Board simply did not buy it -- and this Court should not either.

The Port also complains that the reasons the Board gave do not support its conclusion. (Port Br. at 19.) This is not so. But in any event, this Court can affirm the Board's ruling "on any theory supported by the record and legal authorities even if the lower tribunal did not consider such grounds."¹³¹

c. The Board's Findings Are Supported by Substantial Evidence

i. Ecology fails to demonstrate that Board findings are unsupported

Ecology challenges Condition 5 as not based on substantial evidence in the record (Ecology Brief at 22), charging the Board with erroneous and mistaken findings (which Ecology mischaracterizes as conclusions). Ecology Br. at 26.

¹²⁹ AR 002886 (Fitzpatrick Prefiled Testimony, p. 6).

¹³⁰ Here, we see "the engineer hoist with his own petard." William Shakespeare, *Hamlet* act 3, sc. 4. The WER study process is so costly and complex that the Permit Writer's Manual Appendix provides a ten-page *overview* of the process, including nearly over two full pages of warnings, cautions, and explicit pre-conditions. AR 033357-359 (Permit Writer's Manual at App. 6-74 - 6-76). The complexity of deriving a Final WER itself is suggested by the formulae on pages 78 and 79 of the Manual's Appendix 6. (AR 033361-362.)

¹³¹ *Heidgerken v. Department of Natural Resources*, 99 Wn. App. 380, 388, 993 P.2d 934 (2000), *citing LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989), *and Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984).

First, Ecology asserts the Board "appears to have erroneously concluded" (emphasis added; citing page 39 of the Board's Order, which is plainly in the Findings -- not the Conclusions) that the Port's range-finding studies predetermine the results of a WER study.¹³² Yet the Board said no such thing. In fact, its nine-sentence discussion of preliminary screening analyses and range-finding studies was adopted verbatim from the joint Ecology/Port Proposed Findings before the PCHB.¹³³

Next, Ecology charges that the Board "erroneously found" that "the results of the WER study would lead to an increase in the water quality criterion." Ecology Brief at 26, *citing* AR 000812 (PCHB Order at 39). But again, the Board neither said nor found that such an increase would result. *See* AR 000812. Rather, the Board adopted respondents' proposed findings verbatim, and then stated that it did not believe that " the water quality criterion should be increased." *Id.*

Ecology similarly asserts without citation that the Board "mistakenly concluded" that a change in the numeric criteria would "necessarily result" in a lessening of the water quality standards. Ecology Br. at 26. Again, the plain language of the Board's Order flatly contradicts this erroneous assertion. In no less than three instances, the Board acknowledged that the WER process generates a ratio used to "adjust" the

¹³² Ecology Br. at 26, citing AR 000812 (PCHB Order at 39).

¹³³ *Compare*, AR 000811-812 (PCHB Order at 38-39, ll. 15 - 11), *with* AR 001050-051 (05/22/02 Respondents' Proposed Findings and Conclusions, p. 21-22, lns. 15-11) (footnotes omitted). The two nine-sentence passages are identical except for the Board's omission, in the first sentence, of a citation. *Compare*, AR 000811 (PCHB Order at 38, lns. 15-16), *with* AR 001050 (05/22/02 Respondents' Proposed Findings and Conclusions, p. 21, lns. 16-17).

generic numeric criterion -- without ever suggesting, much less concluding, that the adjustment would "necessarily" be upward.¹³⁴ Indeed, the Board fully noted the testimony of Ecology witnesses who "indicated that the WER Study would not lessen any of the standards."¹³⁵ Board Condition 5, which preserves the purported basis for Ecology's § 401 Certification, allows Ecology to make the site-specific criteria stricter, but not less strict -- a plain acknowledgement by the Board that the WER could lead to downward (i.e., more strict) adjustments.¹³⁶

ii. The Port Likewise Fails to Demonstrate that Board Findings Are Not Supported by Substantial Evidence

The Port misstates the basis of the Board's ruling by overlooking numerous sampling-related concerns identified by the Board, and by omitting a key rationale the Board offered in support of its conclusion. Port Br. at 17, 19. For example, the Port omits one of the Board's key reasons for imposing Condition 5 (Port Br. at 17): to prevent an action inconsistent with the objectives of federal and state law. AR 000886 (PCHB Order at 113).

¹³⁴ See, e.g., AR 000810 (PCHB Order at 37), at lns. 12-13, 17, and 17-20.

¹³⁵ AR 000811 (*id.* at 38).

¹³⁶ AR 000812, 000886 (PCHB Order at 39, 113). Ecology also asserts (Ecology Br. at 28) -- ironically -- that what the Board did was to "ignore" Mr. Fitzpatrick's testimony. To the contrary, the Board incorporated some portion of Mr. Fitzpatrick's testimony in its findings -- including his testimony about the inherent difficulty of regulating stormwater and applying numeric criteria to stormwater discharges. See AR 002885-886 (Fitzpatrick Prefiled Testimony, pp. 5-6); 055801-802 (Fitzpatrick, Tr. at Day 5, pp. 5-0040-41) and AR 055801-802 (Fitzpatrick, Tr. at Day 5, pp. 5-0040-41); AR 000811, 000886 (PCHB Order at 38, 113). The Board's judgment regarding the credibility of witnesses or the weight to be given to conflicting evidence may not be lightly discarded. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (Div. 1), *rev. denied*, 132 Wn.2d 1004 (1997).

Further, although the Port only acknowledges two sampling concerns,¹³⁷ the Board identified many more in its findings -- including, as discussed above, the Port's inability to determine compliance with numeric water quality criteria,¹³⁸ and the poor characterization of the water quality of both stormwater discharges and receiving waters.¹³⁹

iii. Conclusion

Board Condition 5 properly limits the WER testing provision in Ecology's Certification. Ecology's provision would have allowed violation of the applicable state regulation (WAC 173-201A-040(3)) and leapfrogged WER prerequisites. Most critically, it would have permitted use of WER anomalously, in the context of a § 401 Certification, to undercut, after Board review, the required basis for § 401 certification.

E. A Water Right Is Required for the Port's Low Flow Augmentation Plan

The PCHB correctly decided that Washington law requires that the Port obtain a water right for its low streamflow augmentation plan. The Port's arguments to the contrary founder on both factual and legal error.

1. A Water Right Is an Absolute Prerequisite to Any Beneficial Use of Public Waters.

¹³⁷ See, Port Br. at 19 (only identifying the "sampling concerns" as the lack of upstream/downstream sampling and the lack of hardness data).

¹³⁸ AR 000797-798, 800, 806 (PCHB Order at 24-25, 27, 33).

¹³⁹ AR 000798 (*id.* at 25). In addition, the Board's "sampling concerns" included the inadequacies of the Port's "whole effluent toxicity" or "WET" testing -- the subject of Condition 3, which the Board discussed immediately before its consideration of the site-specific study. See AR 000808-809 (PCHB Order at 35-36).

The Water Code clearly expresses the legislative purpose to provide a complete system of regulation for the distribution of Washington's water resources.¹⁴⁰ Washington exerts ownership over all waters of the state and requires those who propose to use them to do so via the terms of the water code:

all waters within the state belong to the public, and any right thereto, or to the use thereof, shall be hereafter acquired only by appropriation for a beneficial use and in the manner provided and not otherwise

RCW 90.03.010 (emphasis added) . The “manner provided” refers to water right permitting processes, described as “the central feature of the Water Code.” 23 Wash. Prac. § 8.6. Specifically:

Any person, municipal corporation, firm, irrigation district, association, corporation or water users' association hereafter desiring to appropriate water for a beneficial use shall make an application to the department for a permit to make such appropriation, and shall not use or divert such waters until he has received a permit from the department as in this chapter provided.¹⁴¹

Three exceptions to water right permitting requirements do exist, but none apply here. The first authorizes the use of up to 5,000 gallons per day of water without a permit for various household and stockwater uses.¹⁴² The second and third exemptions authorize the re-use of water discharged from municipal wastewater treatment facilities and agricultural

¹⁴⁰ RCW 90.03.005; 90.03.010; *State v. Lawrence*, 165 Wash. 508, 510-11, 6 P.2d 363 (1931)

¹⁴¹ RCW 90.03.250; *see also* RCW 90.03.290 (setting tests for issuance of water permits).

¹⁴² RCW 90.44.050; *see Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 12-18, 43 P.3d 4 (2002) (examining domestic well exemption and limiting its scope).

processing facilities.¹⁴³ Other than these three well-defined exceptions, none of which apply here, compliance with the water right permitting processes of RCW Ch. 90.03 is a prerequisite to all use of state waters for a beneficial purpose.

In arguing that no water right is required here, the Port is asking this Court for a new exemption from the requirements of the Water Code. This cannot be sustained under the existing unambiguous statutes. Exceptions to a general statutory rule, especially when the general rule is unambiguous, are strictly construed with any doubts resolved against the exception.¹⁴⁴ Moreover, where a statute provides for a stated exception, no other exceptions will be assumed.¹⁴⁵

The Board was clear in finding that the Port's low flow augmentation plan is not stormwater management, and that finding is fully supported by the evidence. AR 000894 (PCHB Order at 121). This Court should not be stampeded by the Port's feigned alarm on behalf of all stormwater projects everywhere.¹⁴⁶ They are not at issue. However,

¹⁴³ RCW 90.03.252; 90.46.120; 90.46.150.

¹⁴⁴ *Converse v. Lottery Commission*, 56 Wn. App. 431, 434, 783 P.2d 1116 (Div. 1 1989), citing *State v. Wright*, 84 Wn.2d 645, 652, 529 P.2d 453 (1974); see also *In Re Deadman Creek*, 103 Wn.2d 686, 693, 694 P.2d 1071 (1985) (declining to imply an exemption for domestic use of surface waters into the water code, notwithstanding domestic well exemption).

¹⁴⁵ *Jepson v. Dep't of Labor & Industries*, 89 Wn.2d 394, 404, 573 P.2d 10 (1977); *State v. Kazeck*, 90 Wn. App. 830, 834, 953 P.2d 832 (Div. 2 1998).

¹⁴⁶ The Port Brief (at 51) cites to a PCHB document in which, the Port claims, the Board "itself recognized" what the Port calls the "disastrous results for development in the state" of the Board's water right ruling. See Port Br. at 51. In fact, the Board said no such thing. The Port's quotation is of a sentence in the Board's pretrial decision on certification of its Stay Order for interlocutory review. At that time, the Board of course had not issued any decision on the merits of the water right issue. This January 2002 statement, issued before the March 2002 trial and the Board's August 12, 2002, final

adoption of the Port's position would create a huge loophole in the comprehensive regulation of water resources under the Water Code. Stormwater managers around Washington would be led to believe that they could appropriate their captured waters for their own specialized use, rather than treating them as unobligated waters of the state. Neither Ecology, nor the Board, nor this Court is empowered to create such an exemption.¹⁴⁷

2. Both the Law and Substantial Evidence Support the Board's Finding that the Port's Low Flow Augmentation Plan Is Not Just a Stormwater Management Plan.

a. Introduction

In claiming that its use of water to augment streamflow in Des Moines and Walker Creeks constitutes stormwater management rather than a beneficial use of water (Port Br. at 51-53), the Port challenges the Board's finding that "[w]hat is different in this stormwater management system is the manner in which the stormwater is released from a detention facility. Here the water will be used to augment seasonal low flows in a manner distinct from infiltration." AR 000825 (PCHB Order at 52). This

decision, reflected the various parties' contentions concerning the potential importance of the issue, depending on the Board's ultimate decision. When the Board was again called upon after issuance of its final decision in August 2002 to issue a certificate of appealability, the Board's comments reflected the narrowed focus of the careful water rights decision it had made. It described the key question on this point as "whether a water right is required to utilize detained stormwater to mitigate for low streamflow conditions." AR 000005 (10/09/02 Order Granting Certificate of Appealability, at p. 5). By its own terms, then, this does not encompass the vast majority of stormwater collection and detention systems across Washington, as the Port suggests.

¹⁴⁷ The 2003 Legislature did amend RCW 90.03.370 to create an exemption from secondary reservoir permitting requirements for "small irrigation impoundments." 2003 Laws, Ch. 329 (SSB 5575). No mention is made of industrial stormwater facilities.

finding, however, is amply supported by substantial evidence -- as is the Board's finding¹⁴⁸ that the Port's proposal to capture, detain and discharge stormwater for low flow augmentation purposes is not simply management, but constitutes actual use of state waters -- and may not be disturbed on appeal.¹⁴⁹

The Port also challenges the Board's legal conclusion that a water right is required for the beneficial use of stormwater. But the state Water Code is clear in designating the use of water for "preservation of environmental values" such as restoring and improving the aquatic systems of Miller and Des Moines Creeks as a beneficial use. RCW 90.54.020(1). Once the Board found that the Port's low flow plan entailed a beneficial use of water, that finding compelled the legal conclusion that a water right is required.

b. The Port's low flow plan is not merely stormwater management, but constitutes actual, beneficial use of state waters.

i. The Port's low flow plan is explicitly for a recognized beneficial purpose regulated under the Water Code.

The Port has known since at least 1998 that it would be required to augment flows in Des Moines Creek to offset the hydrologic impacts of the Third Runway project.¹⁵⁰ Mitigation requirements eventually

¹⁴⁸ AR 000825 (PCHB Order at 52).

¹⁴⁹ *King County v. Central Puget Sound GMHB*, 142 Wn.2d 543, 553, 14 P.3d 143 (2000).

¹⁵⁰ AR 041732 (Des Moines Creek Flow Augmentation Plan at 1).

extended to Miller and Walker Creeks.¹⁵¹ The purpose of flow augmentation is to mitigate the detrimental impacts of the Third Runway Project on local streams. Specifically, the plan is to “provide benefits to the aquatic ecosystem during summer periods of stress caused by elevated temperature and low flow.”¹⁵²

Placing water into a stream for the purpose of providing “benefits to the aquatic ecosystem,” is specifically called out as a beneficial use under the Water Code, subject to permit. “Uses of water for . . . fish and wildlife maintenance and enhancement, recreational, . . . and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.” RCW 90.54.020(1). That the purpose of the Port’s mitigation plan is to restore and protect environmental values in the affected streams has never been disputed by the Port or Ecology.

ii. Preexisting regulatory guidelines as well as agency experts agree that low flow augmentation is not stormwater management.

The § 401 Certification requires the Port to mitigate very precisely for its low flow impacts, placing water into Des Moines and Walker Creeks at specified times in specified amounts.¹⁵³ The Port argues that the design of its low flow augmentation, which is intended to satisfy these

¹⁵¹ A detailed history of the Port’s low flow plan is set forth in ACC’s Opening Brief at 38-47.

¹⁵² AR 025076 (Des Moines Creek Flow Augmentation Preliminary Design at 1-1).

¹⁵³ AR 016911-913 (§ 401 Certification at 22-24).

precise requirements, is nothing more than stormwater infiltration and therefore does not constitute actual “use” of water. Port Br. at 48-50. Based on the evidence, the Board did not agree.

First, the Board examined the two principal documents concerning the management of stormwater in Western Washington, the 1998 King County Surface Water Design Manual (AR 031748, *et seq.*), and the Department of Ecology Stormwater Management Manual for Western Washington, adopted just six months before hearing (AR 053462, *et seq.*). Both manuals describe the familiar practice of infiltration of stormwater via open ponds, trenches or buried perforated pipe that deliver water into the soil.¹⁵⁴ Such water percolates through the soil and eventually re-emerges as base flow in affected streams.¹⁵⁵

However, such untargeted stormwater infiltration cannot achieve the precise timing and level of assurance required to mitigate the Third Runway Project’s depletion of flow in local streams.¹⁵⁶ The Port’s construction of a facility for and use of stormwater in perpetuity to provide targeted release of specified quantities of water to streams during specified

¹⁵⁴ AR 053968 (August 2001 Stormwater Management Manual for Western Washington, Vol. III, p. 3-60).

¹⁵⁵ AR 013748-032546 (1998 King County Surface Water Design Manual); AR 053462-054466 (2001 Ecology Stormwater Management Manual for Western Washington); AR 056008-010 (O’Brien, Tr. at Day 6, pp. 6-0055 to 6-0057); AR 017762-766 (10/01/01 Declaration of Edward O’Brien); AR 016796 (S. Swensen Prefiled at ¶¶ 9-11); AR 056271-272, 056285-286 (Whiting, Tr. at Day 7, pp. 7-0103 to 7-0104, and pp. 7-0117 to 7-0118).

¹⁵⁶ AR 056571 (S. Swensen, Tr. at Day 8, p. 8-0184).

time periods is nowhere contemplated in either the King County or Ecology manuals.¹⁵⁷ None of the Port or Ecology’s stormwater experts had ever encountered a stormwater management plan like that.¹⁵⁸

Faced with this evidence, the Board properly found that the stormwater “will be used to augment seasonal low flows in a manner distinct from infiltration,”¹⁵⁹ and that the Port’s proposal is not merely stormwater management.

iii. The Port has previously acknowledged that its low flow plan required water rights; further, Ecology has previously required and issued water rights for that type of use.

The Port, since 1998, made at least two attempts to obtain water rights for its low flow augmentation plan, explicitly acknowledging that low flow augmentation is a beneficial use under the Water Code.

Between 1998 and 2000, the Port’s proposed water source for low flow mitigation was an existing well at the Tyee Golf Course, in the upper Des Moines Creek basin.¹⁶⁰ In August 2000, the Port submitted a water

¹⁵⁷ AR 056271 (Whiting, Tr. at Day 7, pp. 7-0103, line 15 to 7-0104, line 2) (King County Manual does “not have specific standards” re low flow mitigation); AR 056284 (Whiting, Tr. at Day 7, p. 7-0116, lines 24-25) (“Q: Does the King County manual address low-flow mitigation plans? A: No, it does not.”); *see also* AR 017540 (Whiting Stay Declaration, p. 6, line 4).

¹⁵⁸ AR 055383-384 (O’Brien, Tr. at Day 3, pp. 3-0067 to 3-0068); AR 056571-572 (S. Swensen, Tr. at Day 8, pp. 8-0184 to 8-0185); AR 056284-286 (Whiting, Tr. at Day 7, pp. 7-0116 to 7-0118); AR 017535-572 (10/01/01 Declaration of Kelly Whiting); AR 015146 (Willing Prefiled at ¶ 15); AR 055531-532 (Willing, Tr. at Day 3, pp. 3-0215 to 3-0216).

¹⁵⁹ AR 000825 (PCHB Order at 52).

¹⁶⁰ AR 024345 (09/28/98 Letter, Port to Ecology): “If this water [Tyee Golf Course well] were not available the Port would examine the availability of other rights held by the Port, the Highline Water District, or other private water rights owners.”); AR 041733

right change application to Ecology, asking to add a new purpose of use to the Tyee well water right: “flow augmentation for Des Moines Creek.”¹⁶¹ The Tyee transfer application was not pursued, due to possible prior relinquishment of the pre-existing water right through non-use.¹⁶²

In September 2000, the Port prepared a revised augmentation plan proposing to purchase water from Seattle Public Utilities (SPU) as a source for augmenting low flows caused by the project.¹⁶³ That proposal was later withdrawn when Ecology informed the parties that it would require a water right change application to add low flow augmentation as a purpose of use.¹⁶⁴

It was not until December 2000, after several failed attempts to obtain a water source through Water Code processes, that the Port began to assert that a water right was not needed in connection with its latest proposal for the use of stormwater as its source for stream flow augmentation.¹⁶⁵

This Port exemption assertion was controversial within Ecology. Water right decisions are normally made by the Department’s four

(1998 Des Moines Creek Flow Augmentation Plan (“The flow augmentation project will require a new or modified water right obtained from Ecology for consumptive use of groundwater.”)).

¹⁶¹ AR 023782-785 (06/19/00 Letter from Feldman to Svoboda); AR 023786-788 (06/22/00 Port Application for Change/Transfer of Water Right); AR 056389-390 (Smith, Tr. at Day 8, pp. 8-0001 to 8-0002.)

¹⁶² AR 055446 (D. Swenson, Tr. at Day 3, pp. 3-0139 to 3-0130).

¹⁶³ AR 025072 (September 2000 Des Moines Creek low flow plan); AR 055324-325 (Smith, Tr. at Day 8, pp. 8-0004 to 8-0005.)

¹⁶⁴ AR 055450-451 (D. Swenson, Tr. at Day 3, pp. 3-0134 to 3-0135).

¹⁶⁵ AR 043961-044091 (06/19/00, Earth Tech, Low Streamflow Analysis); AR 056394-395 (Smith, Tr. at Day 8, pp. 8-0006 to 8-0007). *See* ACC Opening Br. at 42.

regional managers for the Water Resources Program.¹⁶⁶ But the decision to waive the water right requirement for the Port was elevated to Ecology's "senior management team," led by agency director Tom Fitzsimmons.¹⁶⁷

The waiver of the water right prerequisite was a decision that contravened existing Ecology practices and Board precedent. The Board had previously held that a water right was required for the low flow mitigation plan proposed for a controversial gold mine project near Tonasket.¹⁶⁸ Further, as Ecology's water resource managers established at trial, the agency does in fact issue in-stream flow water rights for low flow mitigation purposes, either to offset the impacts of out-of-stream water usage, or to offset the hydrologic impacts of the subject project.¹⁶⁹ Several examples of water rights issued for low flow purposes were discussed, including examples from the Kitsap peninsula, King County, and the

¹⁶⁶ AR 055444-445(D. Swenson, Tr. at Day 3, pp. 3-0128 to 3-0129); AR 055462 (Barwin, Tr. at Day 3, p. 3-0146); AR 055479-480 (Schlender, Tr. at Day 3, pp. 3-0163 to 3-0164).

¹⁶⁷ AR 028645 (Hellwig Dep. at 189); AR 028559-560 (Fitzsimmons Dep. at 93-94). In its own appeal of the PCHB decision, ACC challenges the Board's refusal to consider, on the grounds that attorney-client privilege had not been waived, a public disclosure document that shows that Ecology's Attorney General advised that a water right is required for the low flow plan. See ACC Opening Br. at 56-59. Should the Court find the Board erred in excluding that evidence, the referenced document (AR 006829 (04/03/01 Notes from Senior Management Team Meeting re: Stormwater and Water Rights)) is available for the Court's review on this issue.

¹⁶⁸ *Okanogan Highlands Alliance v. Ecology*, PCHB No. 97-146, *et seq.*, Summary Judgment on Stipulated Issues Nos. 20, 21 and 22 (10/23/98); see also *Bevan v. Ecology*, PCHB No. 48, Findings of Fact, Conclusions and Order (1972) (approving issuance of instream water right for fish research purposes); AR 055462-466 (Barwin, Tr. at Day 3, pp. 3-0146 to 3-0150.)

¹⁶⁹ AR 055447-448, 451 (D. Swenson, Tr. at Day 3, pp. 3-0131 to 3-0132, p. 3-0135); AR 055464, 469 (Barwin, Tr. at Day 3, p. 3-0148, p. 3-0153).

Yakima River basin.¹⁷⁰ Ecology also requires water rights for the beneficial use of stormwater for irrigation purposes.¹⁷¹

In sum, even though the Port had already applied for a water right for its low flow plan and was aware that adding water to a stream in perpetuity to protect and enhance environmental values is a beneficial use, it nonetheless sought to avoid application of the Water Code. And even though Ecology had previously required and issued water rights for just such a purpose, and understood that low flow augmentation is a beneficial use, the agency nonetheless departed from past practice and allowed an exemption for the Port.

c. Low flow augmentation is a beneficial use under the water code and therefore requires a water right.

i. Protection of environmental values is a beneficial use under the Water Code.

As this Court has recognized in several cases over the past decade, beneficial use is a linchpin concept in Washington water law.¹⁷² A term of art in water law, beneficial use encompasses two principal elements of a water right: purpose and quantity. *Id.* When referring to purpose, beneficial use is defined to mean productive, ‘end use’ of water. At issue here is whether low flow augmentation constitutes a beneficial purpose of

¹⁷⁰ AR 055447-448 (D. Swenson, Tr. at Day 3, pp. 3-0131 to 3-00132); AR 055471 (Barwin, Tr. at Day 3, p. 3-0155).

¹⁷¹ AR 055450 (D. Swenson, Tr. at Day 3, p. 3-0134); AR 055472-473 (Barwin, Tr. at Day 3, pp. 3-0156 to 3-0157).

¹⁷² *Dep’t of Ecology v. Acquavella*, 131 Wn.2d 746, 755, 935 P.2d 595 (1997); *Dept. of Ecology v. Grimes*, 121 Wn.2d 459, 468, 852 P.2d 1044 (1993).

use under the Water Code. *Neubert v. Yakima-Tieton Irr. Dist.*, 117 Wn.2d 232, 238-39, 814 P.2d 199 (1991).

As discussed above, substantial evidence supports a factual finding that the Port's augmentation of low flow is for the purpose of protecting environmental values of Des Moines and Walker Creeks. Prior to 1971, protection of in-stream values was not always considered a beneficial use of water. In 1971, however, the Washington Legislature made an important break with western water law tradition and overtly incorporated environmental protection into the concepts of the Water Code. *Stempel v. Dep't of Water Resources*, 82 Wn.2d 109, 117, 508 P.2d 166 (1973). Beneficial uses of water are now defined to include "fish and wildlife maintenance and enhancement . . . and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state[.]" RCW 90.54.020(1); see also RCW 90.14.031(2) (defining beneficial uses for purposes of claims registration and relinquishment). The definitions and policies contained in Chapter 90.54 RCW are intended to guide the utilization of state waters, RCW 90.54.020, and "to provide direction to the department of ecology . . . in carrying out water and related resources programs." RCW 90.54.010(2). In defining beneficial uses in RCW 90.54.020(1), the Legislature was establishing the purposes for which water rights are required under RCW 90.03.290. *Gregoire, et al., An Introduction to Washington Water Law* at IV:22 (2000).

Consonant with the decision to include in-stream water uses within

the ambit of the Water Code, several legal mechanisms have become available to protect water flowing in streams. They fall into two general categories: creation of minimum in-stream flows and creation of private and trust water rights to augment flows. Minimum in-stream flows are created and administered by the state for the benefit of the public and, as the Board correctly held, are not at issue here.¹⁷³

In addition to the minimum flow program, at least three methods exist by which private appropriators may add water to streams (at specific sites in specific amounts) to create environmental benefits. Stream flow augmentation water rights can be created through the grant of new rights, RCW 90.03.290, the transfer of existing rights, RCW 90.03.380, and the creation of trust water rights, Chs. 90.38 and 90.42 RCW.¹⁷⁴

The Port implies in its briefing that such low flow augmentation is not a beneficial use of water.¹⁷⁵ Port Br. at 53. However, to the extent this constitutes a legal question, the Water Code is clear that the use of water

¹⁷³ AR 000896-898 (PCHB Decision at 123-25); *see, e.g.*, WAC 173-509-030(1) (establishing minimum in-stream flows for mainstem of Green River); *Postema v. Pollution Control Hearings Board*, 142 Wn.2d 68, 11 P.3d 726 (2000).

¹⁷⁴ AR 055470-471 (Barwin, Tr. at Day 3, pp. 3-0154 to 3-0155). As discussed above, the Port had, at the time of trial, pending before Ecology an application to transfer an existing off-stream golf course irrigation right to instream uses.

¹⁷⁵ The Port assigns error to the Board's conclusion that stormwater (i.e., rain water), constitutes public waters of the state. AR 000893 (PCHB Order at 120). But the Port makes no argument nor cites any evidence to the contrary. Failure to brief an issue constitutes waiver under RAP 10.3(5). *Hollis v. Garwall*, 137 Wn.2d 683, 689, n.4, 974 P.2d 836 (1999).

In any event, there is no argument to the contrary. All waters of the state are public waters. RCW 90.03.010. Indeed, a ruling by this Court that the Port has a right to use water based on its capture and use of that water on its own property (Port Br. at 51), would effectively revive the riparian rights doctrine – a legal regime that was explicitly terminated by the Washington legislature in 1917. RCW 90.03.010; *Dep't of Ecology v. Abbott (In Re Deadman Creek)*, 103 Wn.2d 686, 694 P.2d 1071 (1985).

to protect fisheries and aquatic resources and enhance the environment is a beneficial use subject to the water right processes of the Water Code.

ii. Ecology's waiver of the water right prerequisite was contrary to past agency practice and not entitled to deference.

As discussed above, Ecology has in the past required water rights for low flow augmentation plans. The Board has also ruled that water rights are required for this purpose. Moreover, Ecology requires a water right for the use of stormwater for purposes such as irrigation or domestic supply.¹⁷⁶ Thus, Ecology's decision to exempt the Port's water use from Water Code requirements was contrary to explicit past practices of the agency. The Port nevertheless argues that it is Ecology's decision in this matter – not the PCHB's – which is entitled to deference before this Court. Deference, however, is not appropriate where the statute is not ambiguous. *H&H Partnership v. Ecology*, 115 Wn. App. 164, 170-71, 62 P.3d 510 (Div. 2 2003). The Water Code is not ambiguous about the need to obtain a water right for the beneficial use of all public waters.

Further, an administrative determination will not be accorded deference if the agency's interpretation conflicts with the relevant statutes.¹⁷⁷

Deference is also not appropriate when an agency acts inconsistently with its prior practice in interpreting and applying the

¹⁷⁶ AR 055450 (D. Swenson, Tr. at 3-0134.)

¹⁷⁷ *Cowiche Canyon Conservancy v. Ecology*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992), citing *Department of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991); *Weyerhaeuser Co. v. Cowlitz Cy.*, 109 Wn.2d 363, 371-72, 745 P.2d 488 (1987).

law.¹⁷⁸ Here, Ecology witnesses – the water right managers with years of expertise who are delegated and exercise authority to issue water rights for the state – acknowledged at trial that they have under the Water Code both required water rights for low flow augmentation plans, and for the use of stormwater for other beneficial purposes. The decision here not to require a water right was made outside the normal practice and precedent of agency water right decision-making.¹⁷⁹ In doing so, Ecology forfeited any claim to deference to agency practice.

In contrast, the PCHB is entitled to deference here, as the quasi-judicial body that created the record and made the ultimate decision for review by this Court. With its specialized expertise in interpreting the Water Code, the PCHB is entitled to deference. *See* footnote 30, *infra*.

3. CWA Water Quality Certifications Do Not Obviate, But Depend On, Compliance With All State Water Quality Laws.

a. Section 401(a) of the CWA requires compliance with all state water quality laws.

A state certification under the federal CWA must assure compliance by federally-permitted projects with the requirements of state water quality standards and all other appropriate requirements of state law:

¹⁷⁸ *Skamania County v. Columbia River Gorge Comm.*, 144 Wn.2d 30, 43, 26 P.3d 241 (2001).

¹⁷⁹ Washington Courts have previously rejected as arbitrary and capricious the practice of the current Ecology administration to forego necessary permits. *Skokomish Indian Tribe v. Fitzsimmons and Dep't of Ecology*, 97 Wn. App. 84, 982 P.2d 1179 (Div. 2 1999), *rev. denied*, 143 Wn.2d 1018 (2000).

Any certification provided under this section shall set forth . . . limitations . . . necessary to assure that any applicant for a Federal license or permit will comply with [federal requirements] . . . and with any other appropriate requirement of state law . . .”

33 U.S.C. § 1341(d) (emphasis added). This Court has interpreted this language to mean:

that the phrase "any other appropriate requirement of State law" in section 401(d) does not refer only to state water quality standards. We agree with the *Arnold* court that the phrase is a congressional authorization to the states to consider all state action related to water quality in imposing conditions on section 401 certificates.

Dep't of Ecology v. PUD No. 1 of Jefferson County, 121 Wn.2d 179, 192, 849 P.2d 646 (2003) (*Elkhorn I*), citing *Arnold Irrig. Dist. v. Dep't of Env'l Quality*, 79 Or.App. 136, 142, 717 P.2d 1274, rev. den., 301 Or. 765, 726 P.2d 377 (1986). The Oregon case cited with approval in *Elkhorn I* interpreted CWA § 401(d) to not just authorize, but to require compliance with all state laws relating to water quality. The *Arnold* court ruled that Oregon's Department of Environmental Quality:

is a state agency and must comply with state law to the extent that federal law does not supersede it. That law requires DEQ to act, with respect to programs affecting land use, in compliance with the statewide land use goals and in a manner compatible with acknowledged comprehensive plans. ORS 197.180(1). DEQ therefore must include limitations reflecting the goals and plans in section 1341 certificates to the maximum extent that the CWA allows--that is, to the extent that they have any relationship to water quality. Only if a goal or plan provision has absolutely no relationship to water quality would it not be an "other appropriate requirement of State law." In that case, and only in that case, would the CWA override DEQ's obligations under ORS 197.180(1).

Arnold, *supra*, 79 Or.App. at 143. This holding is consistent with the

CWA § 401(d), requiring that state agencies “shall” incorporate all limits required by appropriate state laws.

The reasoning of the Oregon court is compelling in view of the purposes of the Washington Water Code and the Port’s proposal. The goals and processes of the Code are explicitly related not only to water quality, but also to comprehensive regulation of water resources to protect other water users and the public interest. RCW 90.03.290. As discussed below, water right permitting serves a function that is not otherwise satisfied by the water quality certification process. It is incumbent upon Ecology to utilize Water Code processes to provide “reasonable assurance” that the Port’s low flow mitigation is consistent with Washington’s system for water resources protection.

b. Compliance with Water Code requirements provides reasonable assurance that water is available for beneficial use and that the source of water for the low flow plan is secure.

The Legislature’s declared purposes for the Water Code are “to promote the use of the public waters in a fashion which provides for obtaining maximum net benefits arising from both diversionary uses of the state’s public waters and the retention of waters within streams and lakes in sufficient quantity and quality to protect in-stream and natural values and rights.” RCW 90.03.005; *see also* RCW 90.03.010; RCW 90.54.010. These purposes are implemented through the Water Code permitting processes, which require that Ecology make findings regarding water

availability, non-impairment of pre-existing water uses, beneficial use, and the public interest.¹⁸⁰

The water resources of Des Moines and Walker Creeks are protected under the Water Resources Inventory Area 9 (WRIA 9) rule, Ch. 173-509 WAC. The purpose of the rule is to:

retain perennial rivers, streams, and lakes in the Green-Duwamish drainage basin with in-stream flows and levels necessary for preservation and protection of wildlife, fish, scenic, aesthetic and other environmental values, recreational and navigational values, and to preserve water quality. . . The instream flow rules presented here are for preservation of the existing resources so that when future planning or development occurs on this river these resources will be available.

WAC 173-509-010. The provisions of the rule apply to future water right authorizations issued pursuant to the state's water rights codes. WAC 173-509-020. The WRIA 9 rule closes Des Moines Creek and Walker Creek to new “consumptive” water right appropriations.¹⁸¹ WAC 173-509-040. The closure is based on Ecology’s finding that no waters are available for new water rights. *Id.* Thus, in order to issue a water right in these basins, Ecology would have to determine that the use was non-consumptive, and then evaluate it under the tests for a new or existing water right application. Instead, Ecology exempted the Port’s use of stormwater from

¹⁸⁰ RCW 90.03.290; *Hallauer v. Spectrum Properties*, 143 Wn.2d 126, 142-44, 18 P.3d 540 (2001) (explaining process for obtaining a water right).

¹⁸¹ Walker Creek is a subwatershed that is tributary to Miller Creek, which is named as a closed stream in the rule. WAC 173-509-040. Walker Creek is therefore also closed.

the water right permit process, bypassing evaluation of the impacts of the use required by law.¹⁸²

This (in)action is a serious omission in the context of the “reasonable assurance” standard. The Port’s use may or may not be consumptive and it may or may not impair other uses, including preservation of the streams as required by the WRIA 9 rule. WAC 173-509-010. The question is not simply whether the Port can prevent others from appropriating water that flows on Port property, but the relationship of that water and the Port’s use of it to all of the water resources within the watershed, including the uses made of that water by other parties (including the State on behalf of the stream).¹⁸³

Only by applying the tests for a water right can the State ensure that water is legally, as well as physically, available for the Port’s use. If, for example, the water resources of this basin are to be made available for “future planning and development” as Ecology’s WRIA rule now contemplates, how will future water permitting decisions intersect with the Port’s de facto appropriation of water? WAC 173-509-010.

¹⁸² In bypassing these requirements Ecology also eliminated the ability of third parties to challenge the Port’s appropriation on the basis that the use is consumptive, impairs other water rights, or other statutory factors.

¹⁸³ The Port argues that, because the § 401 Certification states that the low flow plan “shall remain in effect in perpetuity,” a water right would be superfluous. Port Br. at 50-51. This begs the question. Water rights are a legal prerequisite to fulfillment of the Certification conditions. Without a water right, the Port could, for example, later assert that its perpetual fulfillment of the certification conditions was legally impossible. Or, other water right holders could claim the Port’s water use interferes with exercise of their rights. It is both the perpetual nature of the water right as well as its integration of the Port’s use with all other beneficial uses of water in the subject streams that provides assurance.

The Third Runway § 401 Certification requires as a routine matter that the Port obtain several additional permits and approvals, including NPDES permits and associated stormwater permits,¹⁸⁴ Hydraulic Project Approvals,¹⁸⁵ dam safety permits,¹⁸⁶ and restrictive covenants.¹⁸⁷ The Certification states that “[t]his Order does not exempt and is conditional upon compliance with other statutes and codes administered by federal state, and local agencies.”¹⁸⁸ Ecology treated water rights differently, perhaps because it was evident that obtaining a water right would be difficult, and the Port had balked at doing so. However, expediency cannot trump a fundamental statutory requirement. Nothing in the Water Code allows treating the legal prerequisite for a water right as an exceptional process that is better disposed of than complied with.

4. The Board’s findings are supported by substantial evidence and the Board’s conclusions are supported by law: the Port must get a water right.

The Board correctly found that the Port’s proposal to utilize stormwater for low flow augmentation is a beneficial use and not simply “management” of stormwater. Based on this finding, the Board correctly required the Port to obtain a water right as part of the water quality certification process. A water right is needed to meet the CWA reasonable assurance standard because the allocation and management of state waters

¹⁸⁴ AR 016899 (§ 401 Cert. Cover Letter at p. 2), AR 016917 (§ 401 Cert., p. 28).

¹⁸⁵ (AR 016899 (§ 401 Cert. Cover Letter at p. 2), AR 016921 (§ 401 Cert., p. 32).

¹⁸⁶ AR 016909 (§ 401 Cert., p. 20).

¹⁸⁷ AR 016898, 900, 902 (§ 401 Cert., pp. 9, 11, 13).

¹⁸⁸ AR 016920 (§ 401 Cert., p. 31).

is accomplished through the comprehensive processes of the Water Code.

The Board's decision to require a water right must be affirmed.

F. The Board's 1 cfs Low Flow Condition Provides Necessary Protection Against Degradation for Des Moines Creek, as Evidenced in the Record

1. Introduction

The Port assigns error to the Board's condition requiring 1 cubic foot per second (cfs) mitigation in Des Moines Creek. Port Br. at 20-26. However, the Board's findings and conditions imposed to preserve Des Moines Creek at a minimal level in the face of the Port's proposal to replumb the watershed are supported by substantial evidence and not subject to reversal.

2. The Board's Condition No. 6 Is Supported by Substantial Evidence.

a. The Port's modeling results were shifting and imprecise

The record before the Board reflected that Des Moines Creek, although impacted by human activity, is currently a functioning, viable stream system.¹⁸⁹ The Creek is designated Class AA under state water quality regulations and therefore entitled to the highest level of protection. WAC 173-201A-130. It is a relatively straightforward matter to preserve a stream by not tampering with it or detrimentally disrupting its surroundings and sources. However, once a project proposes such disruption or tampering, engineers take over, offering various computer

¹⁸⁹ AR 000816 (PCHB Order at 43); ACC Op. Br. at 38-39 and note 60.

“models” to predict the post-project fate of the stream, and offering various “solutions.” While overlaid with a patina of scientific certainty (perhaps deriving from all of the numbers and formulae involved), these models are only rough predictors of the success of any “mitigation.” A key frailty relates to the adage “garbage in, garbage out”: the less rigor applied in model structure and, particularly, inputs, the less accurate the output (prediction). This is the context in which the Board reviewed the question of what quantity of mitigation was necessary to protect streamflow in Des Moines Creek -- even minimally -- from degradation.

The Port’s suggestion (Br. at 45) that the Board unconditionally accepted its low flow modeling is simply wrong. The Board here was faced with Port predictions regarding the impacts of the 3RW Project on local streams which were shifting and imprecise, calling for a margin of error. The Board’s Condition No. 6 reflects this in its acceptance of alternative evidence regarding appropriate low flow mitigation for Des Moines Creek.

i. The October 2001 errors

The Port disclosed the first problems in its modeling in October, 2001, approximately one month after Ecology issued the § 401 Certification, as reflected in notes of a meeting among Port consultants and Ecology staff: “In the process of preparing the revised document, Port of Seattle consultants identified errors in the low streamflow modeling that require correction in the revised document, and that will affect the

conclusions of the low streamflow analysis.”¹⁹⁰ These errors were significant, and included inaccurate input data and conversion factors, requiring the use of new models and recalibration of previous models.¹⁹¹ Ecology’s response was not enthusiastic, perhaps because the problems had been disclosed only after Ecology issued its decision: “the acceptability of revised modeling will be based on Ecology review of the final Low Streamflow Analysis and Summer Low Flow Impact Offset Facility Proposal.”¹⁹²

Ecology’s outside reviewer, King County’s stormwater modeling expert Kelly Whiting, was even more forthright in his concerns. He had recommended that Ecology wait to issue the § 401 Certification until the July 2001 Low Flow Plan had been completed.¹⁹³ Upon learning that the modeling contained in that incomplete document, relied upon by Ecology to issue the Certification, was indeed inaccurate, he expressed frustration:

Apparently, now when they look at it, 27% of the runoff from the runways is not able to infiltrate into the filter strips. . . . I raised all these issues, but the Port’s consultants were unwilling to do it right, said it didn’t matter, and got me to buy into the approach using the facilitated process.¹⁹⁴

¹⁹⁰ AR 022925-932 (10/30/01 Low Flow Analysis Meeting Notes).

¹⁹¹ AR 022925-927 (*id.* at pp. 1-3).

¹⁹² AR 022931-932 (*id.* at pp. 7-9). Ecology had still not accepted the December 2001 Low Flow Plan as of the time of the PCHB trial. *See* Section F.2.a.ii, *infra*.

¹⁹³ AR 056286-287 (Whiting, Tr. at Day 7, pp. 7-0118, line 19 to 7-0119, line 5).

¹⁹⁴ AR 017663 (10/25/01 E-mail, Kelly Whiting to Ann Kenny, et al.). The “facilitated process” was a mechanism used to speed up certification. It involved use of a “facilitator” paid for by the Port. AR 054950-951 (Kenny, Tr. at Day 1, p. 1-0105, line 14 to 1-0106, line 14); AR 056287-288 (Whiting, Tr. at Day 7, p. 7-0119, line 16 to 7-0120, line 5).

Mr. Whiting described the errors in detail to Ecology.¹⁹⁵ They should have been corrected when the Port finally distributed its December 2001 Low Flow plan, in anticipation of the upcoming March 2002 PCHB trial. As it turns out, they were not.

ii. The January 2002 errors.

The second set of modeling errors were discovered in January, 2002, following Mr. Whiting's review of the Port's December 2001 Low Flow Plan submittal. At trial, he testified that the December 2001 Plan still "did not satisfy all of my comments, and it raised a couple new ones."¹⁹⁶ Those concerns were described in detail for the Board.¹⁹⁷ Although Mr. Whiting first identified them in January 2002, they had still not been resolved as of the PCHB trial in the last two weeks of March 2002. *Id.*

For example, as previously noted (ACC Op. Br. at 43-47), Ecology's September 2001 § 401 Certification was rushed out before the Port had actually completed its modeling and low flow plan. The Certification addressed this by including a series of "IOUs" from the Port to Ecology. One IOU explicitly directed the Port to compare the modeling simulation provided in the Port's July 2001 (incomplete) low flow plan with the real-world data from the Tyee Golf Course weir gage, in the

¹⁹⁵ AR 017663; *see also* AR 056256, 056257 (Whiting, Tr. at Day 7, p. 7-0088, lines 6-15, and p. 7-0089, lines 14-19).

¹⁹⁶ AR 056252 (Whiting, Tr. at 7-0084, lines 14-15).

¹⁹⁷ AR 022912-923 (02/23/02 Draft Review Comments on Low Flow Plan); AR 056258-259 (Whiting, Tr. at Day 7, pp. 7-0090, line 6 to 7-0091, line 24); AR 056292-303 (*id.* at pp. 7-0124, line 11 to 7-0135, line 9).

upper Des Moines Creek basin.¹⁹⁸ Yet, reflecting a continuing pattern of foot-dragging, the Port's December 2001 Plan still omitted the hydrographs, analysis and statement of adequacy that were required under the § 401.¹⁹⁹ Gaps such as these reflected on the reliability of the Port's analysis of low flow impacts.

The second round of errors (in the Port's December 2001 Plan) prompted Ecology to order the Port to prepare a full review of its low flow modeling and "validation reports" for each of the three basins.²⁰⁰ However, the Port failed to prepare the validation reports in time to be offered into evidence at the PCHB trial.²⁰¹ In any event, based on the significant issues raised by Mr. Whiting in January and February, Ecology's Ann Kenny testified at trial that Ecology still did not have "reasonable assurance" that water quality standards would not be violated as a result of the depletion of flow in the streams surrounding Sea-Tac.²⁰²

¹⁹⁸ AR 016912 (§ 401 Certification (9/21/01), Condition I(1)(b)(i)).

¹⁹⁹ AR 056260, 056291 (Whiting, Tr. at Day 7, p. 7-0092, lines 7-15, and p. 7-0123, lines 8-21); AR 014312 (Leytham Prefiled at ¶ 24); AR 022917 (02/23/02 Draft Review Comments on Low Flow Plan, at 5.)

²⁰⁰ AR 055035-036 (Kenny, Tr. at Day 1, pp. 1-0191, line 14 to 1-0192, line 24).

²⁰¹ AR 056169 (Whiting, Tr. at Day 7, p. 7-0001); AR 055036-038 (Kenny, Tr. at Day 1, pp. 1-0192, line 25 to 1-0194, line 16). The Board was extremely lenient with Ecology and the Port in enforcing the deadline by which new reports had to be disclosed if they were to be offered at trial. The Board ultimately set a final cut-off date of February 28, 2002 for such disclosures -- little more than two weeks before trial. Ecology still attempted to offer post-deadline information about the Port's low flow plan, but it was rejected by the Board. In any event, it was clear from testimony that the issues raised by Mr. Whiting in January 2002 had not yet been resolved, and that Ecology had not yet accepted the Port's revised Low Flow Plan. AR 055037 (Kenny, Tr. at Day 1, pp. 1-0193, line 2 to 1-0194, line 16).

²⁰² AR 055038 (Kenny, Tr. at Day 1, p. 1-0194, lines 12-16).

Evidence of uncertainty in the low flow modeling arena was compounded by evidence reflecting the Port's problematic water quality history.²⁰³ Such evidence provided a context for the Board's concerns about the Port's "scientific" presentation regarding low flow impacts and mitigation and the errors in the Port's low flow analysis, which had yet to be corrected.

Despite these concerns, the Board bent over backward for the Port, allowing into evidence the Port's belated, post-401 Certification December 2001 low flow analysis and plan.²⁰⁴ This was a break because the only document available to Ecology when its § 401 decision was made, the July 2001 low flow plan, was both incomplete and, as later acknowledged by the Port itself, inaccurate and did not support Ecology's August 10 and September 21 findings of reasonable assurance.

Nevertheless, as described above, even the tardy December version fell far short, and only highlighted how the rush to certification in the

²⁰³ The Board found that the Port was not properly sampling its water quality discharges, and that its "sampling results are not truly indicative of the water quality of the stormwater discharges as they enter the receiving waters, or of the water quality in the receiving streams themselves." AR 000798 (PCHB Order at 25). The Board also found that a water quality analysis conducted by the Port and Ecology predicted that "[c]opper concentrations after treatment remained higher than the [water quality] criteria," and that "Ecology's current § 401 certifications acquiesces in the Port's proposal to use basic BMPs" even though basic BMPs will not remove metal contaminants. AR 000799 (PCHB Order at 26). Water quality data reported by the Port, Ecology and the City of Des Moines all pointed to violation of water quality standards for various metals, temperature and fecal coliform. AR 000801-803 (*id.* at 28-30). These findings led the Board to impose a series of water quality conditions to correct the Port's past practices. AR 000880-891, 000908-909 (*id.* at 107-118, 135-136).

²⁰⁴ ACC has assigned error to this decision. ACC Op. Br. at 47-54.

summer of 2001 led to serious error in the low streamflow analysis. These facts were plainly evident to the Board at trial in March 2002.

It is not surprising, therefore, that the Board elected to adopt an alternative “failsafe” approach regarding mitigation for low flow impacts in Des Moines Creek. In doing so, as discussed below, the Board did not simply pick the 1 cfs mitigation figure out of thin air, but based it on the Port’s own proposals and plans. The Port’s suggestion (Br. at 26) that the Board’s failsafe condition was “willful and unreasoning” completely ignores the Port’s own culpability in submitting shifting data and modeling results, prompting the Board to require a bit more to meet the “reasonable assurance” standard required for issuance of a § 401 certification.

b. Substantial evidence supports the Board’s finding that 1 cfs is the appropriate mitigation quantity in Des Moines Creek.

Ample affirmative evidence was presented at trial to support the Board’s finding that the mitigation flow for Des Moines Creek should be 1 cfs. That evidence commenced with the Port’s own August 1998 low flow augmentation plan, which indicated that:

The plan for providing augmentation water to Des Moines Creek was originally proposed by King County as part of the 1997 Des Moines Creek Basin Plan . . . The Port subsequently incorporated the plan into Section 2.1 of *Amended Wetland Mitigation Plan and Supporting Documents, July 15, 1998, which was prepared in*

support of the Port's Section 401 Water Quality Certification for the proposed Master Plan projects.²⁰⁵

The Port continued to propose 1 cfs as the mitigation target for Des Moines Creek impacts caused by the Third Runway project through the end of 2000. In June 2000, the Port filed an application with Ecology seeking a 1 cfs water right to augment flow in Des Moines Creek.²⁰⁶ In its September 2000 Des Moines Creek Flow Augmentation Preliminary Design document, the Port proposed to maintain a 1 cfs flow in Des Moines Creek.²⁰⁷ This Plan was submitted in support of the Third Runway application for § 401 Certification.²⁰⁸

It was only when the Port could not timely obtain a water right to supply mitigation water and turned instead to the complex and expensive stormwater reservoir alternative, that mitigation quantities were suddenly and dramatically reduced. *See* ACC Op. Br. at 40-43.

The Board was faced with a dilemma. It was willing to accept the Port's low flow plan and modeling as "good enough," but did so in the face of evidence reflecting imprecision and ever-shifting problems.²⁰⁹ Given the entirety of the record, the alternative more protective mitigation target for Des Moines Creek (previously adopted by the Port itself) was a

²⁰⁵ AR 041732 (08/18/98 Des Moines Creek Flow Augmentation Plan, at p. 1) (emphasis added).

²⁰⁶ AR 023786 (06/22/00 Port Application for Change/Transfer of Water Right).

²⁰⁷ AR 025077 (September 2000 Des Moines Creek Flow Augmentation Preliminary Design document at 2-1).

²⁰⁸ AR 056392 (Smith, Tr. at Day 8, p. 8-0004, lines 2-22).

²⁰⁹ Although ACC disagrees with the Board's findings regarding the adequacy of the Port's modeling, it did not assign error to them. ACC's challenges regarding the low flow plan involve legal questions on admissibility of evidence and the need for clarification as to when mitigation is to commence. ACC Opening Br. at 38-59.

reasonable choice. This is particularly so in light of the legal standard at issue. The purpose of the § 401 Certification is to prevent degradation of water quality. 33 U.S.C. § 1341(a). In these small streams, where the removal of even small quantities of water could tip the balance of viability,²¹⁰ a conservative and protective approach was indicated.

²¹⁰ AR 000816 (PCHB Order at 43). The Port did not assign error to this finding of fact, which is supported in the record. AR 014385 (Luster Pre-Filed at 21).

3. Under the Substantial Evidence Standard, the Board's Condition May Not Be Overturned.

The Port's challenge to Condition No. 6 presents a purely factual question for the Court, and is therefore reviewed under the "substantial evidence" test set forth in the Washington APA. The Court may grant the relief requested by the Port only if:

The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review . . .

RCW 34.05.570(3)(e). "Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *King County v. Central Puget Sound GMBH, supra*, at 553.²¹¹ Evaluation of evidence under this standard is made in view of the entire record before the Board. In conducting APA review, Washington courts neither weigh credibility nor substitute their judgment for that of the agency. *U.S. West Comm. Inc. v. Wash. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 61-62, 949 P.2d 1321 (1997); *Bowers, supra*. The Board's condition clearly passes this test.

The Port's "willful and unreasoning" epithet is similarly misplaced. Port Br. at 26. Agency findings are arbitrary and capricious only if there is no support for them in the record. *Hubbard v. Ecology*, 86 Wn. App. 119, 123, 936 P.2d 27 (1997).²¹² The Port's difference of

²¹¹ *Accord, Redmond v. Central Puget Sound GMHB*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998); *Bowers, supra*, at 595. Agency findings are entitled to great deference. *R.D. Merrill Co. v. Pollution Control Hrgs. Bd.*, 137 Wn.2d 118, 135, 969 P.2d 458 (1999).

²¹² Where "there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though we think a different conclusion

opinion with the Board's is not equivalent to an absence of support for the Board's decision.

G. The Board Properly Imposed Additional Conditions to Ensure Compensation for Destruction of Existing Wetlands

1. Introduction

The Port argues that the Board erred in finding that the Port had not met the required 2:1 ratio for wetland mitigation²¹³ and in directing the Port to evaluate whether additional in-basin wetland are available to satisfy that requirement. Port Br. at 43-47. The crux of the Port's argument centers on the applicability of Ch. 90.74 RCW, the Aquatic Resources Mitigation Act.

In presenting its argument, the Port exaggerates the benefits of its wetland mitigation plan. The Port is destroying 20 acres of existing functioning wetlands in the Miller, Walker and Des Moines Creek basins. These are not, as the Port alleges, "severely degraded" wetlands, but (for the most part) rated as Category 2 under Ecology's wetland rating system. As such, they provide the substantial benefits for habitat, flood control, etc., which have prompted their protection under state and federal water resource law.²¹⁴

might have been reached." *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994); *Bowers, supra*.

²¹³ While the Port challenges the Board findings that the 2:1 ratio has not been met (AR 000854 (PCHB Order at 81)), the Port does not assign error or present argument on the facts underlying the Board determination, including the Board's findings regarding the invalidity of certain lake surface and stream buffer preservation activities. As discussed below, the Port's failure to properly brief these issues results in their waiver.

²¹⁴ AR 013968-972 (Azous Prefiled at pp. 4-8, ¶¶ 4-6 and Fig. 1, ¶¶ 8-10 and Fig. x); AR 055245-246 (Azous, Tr., Day 2 at pp. 2-0173, line 14 to 2-0174, line 16).

The Port will not create any new wetlands in the Miller, Walker and Des Moines Creek basins to compensate for the 20 acres of wetlands they propose to destroy. Instead, the in-basin activities proposed in the Port's wetland mitigation plan involve "restoring" or "enhancing" existing properties, many of which are not wetlands.²¹⁵ The Port also proposes to "mitigate" for the loss of wetlands by promising not to destroy other wetlands which were already protected by applicable law. AR 000853 (PCHB Order at 80).

Finally, it was established at trial that the Port had arbitrarily rejected or simply not considered available opportunities for in-basin wetland mitigation. Those opportunities could offset the substantial loss of wetlands from these stream systems without creating hazards to aviation. *See* Section G.5.a, *infra*.

The loss of such large percentages of wetlands from watersheds has significant implications for meeting state water quality standards, particularly the anti-degradation rule. To avoid violation of standards, the Board typically adheres to a "no net loss" policy for wetland mitigation. *See* ACC Op. Br. at 18.

In sum, the Port's mitigation plan, as presented to the PCHB, proposed dubious compensation for substantial loss of wetlands in the three watersheds surrounding the Airport, particularly Miller Creek. Once it became evident that there were missed opportunities to ameliorate the

²¹⁵ AR 013972 (Azous Prefiled at p. 8, ¶ 11, Table 1); AR 029353 (NRMP, Table 4.1-3, p. 4-13).

harm, the PCHB responded by imposing appropriate requirements on the Port.

2. The Port’s Issue Pertaining to Assignment of Error No. 5 is limited to the questions of whether the Board erred in requiring the Port to evaluate all in-basin options and in not crediting the out-of-basin mitigation before that occurred.

Because of the size of the record in this case and the extensive findings in the Board’s Final Order, it is incumbent upon the parties to precisely identify in their briefs those findings and conclusions with which they take issue. RAP 10.3(a). Here, notwithstanding the broad-brush statements in its Petition for Review, the wetlands argument in the Port’s opening brief is quite limited.

The Port’s Issue No. 5 challenges the Board’s directive to the Port to evaluate and utilize all feasible in-basin wetland mitigation opportunities before resorting to out-of-basin mitigation. It also questions the Board’s related ruling barring credit for the Port’s out-of-basin “mitigation” until all in-basin opportunities are evaluated. Port Br. at 2-3.²¹⁶ This is the full extent of the error argued by the Port.²¹⁷

²¹⁶ Specifically, The Port’s issue pertaining to assignment of error asks: Whether the PCHB erred by concluding that the wetland mitigation required under the WQC did not meet a 2:1 ratio, when the PCHB failed to count the extensive mitigation that will occur off-site; and whether the PCHB erred in urging consideration of further in-basin mitigation when state law expressly allows out-of-basin mitigation for transportation projects.

Port Br. at 3-4.

²¹⁷ Similarly, Port Brief Section F(1) concludes only with the assertion that the Board’s ruling is arbitrary and capricious for failure to award credit for out-of-basin mitigation. Port Br. at 45.

In reviewing these specific questions, it is important to note what the Port is not asserting. While the Port references some (but not all) of the Board's findings of fact related to the invalidation of credit for "preservation" of three acres of preexisting open lake surface, and "enhancement" of approximately 55 acres of wetland and riparian buffers (Port Br. at 2 (Assignment of Error No. 5)), the Port does not assign error to all of the Board's findings of fact on these matters, nor does it identify the validity of the Board's findings on these matters as an issue in its brief, nor does it offer any argument that these findings are not supported by substantial evidence.²¹⁸ Port Br. at 3 (Issue No. 5); Port Br. at 43-46. Nor is there citation to statute or caselaw regarding the substantial evidence standard employed by this Court to review findings of fact. *See* RCW 34.05.570(3)(e). In light of this, the Board's findings of fact concerning the inappropriate award of mitigation credit for the surface of Lora Lake and buffers must therefore be accepted as verities by this Court.²¹⁹

Thus, the uncontroverted factual predicates on review by the Court of the Port's wetland arguments include the following:

- The Port is destroying 21.34 acres of wetlands in Miller, Walker, and Des Moines Creeks. Final Order at 70.

²¹⁸ With respect to the mitigation activities disallowed by the Board, the only pertinent statement in the "argument" section of the Port's brief simply recites what the Port proposed and what the Board disallowed. Port Br. at 44.

²¹⁹ *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002), *citing State v. Stenson*, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994); 1 Wash. Prac., Methods and Practice § 15.16 (4th ed 1998).

- The Port is required to mitigate at a 2:1 ratio,²²⁰ and must therefore provide a minimum of 42.68 acres of wetland mitigation.
- The Port has proposed only 20.05 acres of valid in-basin wetland mitigation activities. Final Order at 81.
- The Port is therefore required to provide an additional 22.63 acres of acceptable wetland mitigation credit in order to meet the requirements of the § 401 Certification.

It is from these predicates that the Court reviews the Port’s limited arguments.

3. Substantial evidence supports the Board’s findings that neither existing lake surface nor stream buffers merit credit as compensation for wetland destruction.

Even if the Port had not waived its challenge to the Board’s findings of fact concerning the invalidity of reliance on existing Lora Lake surface and riparian buffer preservation as compensation for wetlands destruction, substantial evidence supports the Board’s decision.²²¹

The basis for the Board’s rejection of the Lora Lake mitigation is simple: a preexisting open lake surface does not compensate for destruction of area wetlands (any more than 6 minus 3 equals 6):

²²⁰ The Port asserts that the Certification requires 2:1 replacement of wetlands, a fact that no party disputes. Port Br. at 43. The Port also asserts, incorrectly and out of context, that the Board “found that the wetlands mitigation plan ‘provides for a 2:1 ratio.’” Port Br. at 45. In fact, the PCHB reference read in context is nothing more than the Board’s acknowledgement of the Port’s factual claims, not a finding that the Port’s wetland mitigation plan is adequate. The reference is followed by several pages of PCHB findings explaining why the wetland mitigation plan is wrong. Ultimately the Board concludes that the “NRMP mitigation . . . does not meet Ecology’s 2:1 mitigation target for the project.” AR 000902 (PCHB Order at 129).

²²¹ New arguments may not be raised in a reply brief. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809. WASHINGTON STATE BAR ASS’N., APPELLATE PRACTICE DESKBOOK, § 19.9(2) (2d. Ed. 1998). If the Port attempts to challenge the Board’s findings of fact in its reply briefing, ACC respectfully requests the opportunity to respond.

The concern with the mitigation credits received for Lake Lora is although the Port will be doing some enhancement work along the perimeter of the lake, such as removing the human intrusions (lawns, bulkheads, etc.), the Port will not be doing anything to the surface of the water. The Port received 3.06 acres of mitigation credit for the surface of the Lake.

AR 000852 (PCHB Order at 79).²²² The Board's findings regarding Lora Lake were based on substantial and documents.²²³

The Board was even more emphatic in its rejection of the Port's offer of stream "buffers" to replace the actual wetlands it proposes to destroy:

More problematic to the Board is the calculating of buffers as mitigation for wetland impacts. Riparian buffers may be an appropriate component of a wetlands mitigation plan, but only as an adjunct to meeting the baseline criteria of no-net loss of aquatic resources. No-net loss is measured in both acreage and function, so in order to achieve no net loss in acreage, projects must, at minimum, restore or create an equal area of wetland. Enhancement activities and upland preservation should not be used in exchange for the baseline acres and are not a substitute for replacement of actual wetland losses. While the Board supports the concept of buffering wetlands, such buffers should be added to assure the sustainability of the mitigation of actual wetland mitigation. Thus wetland impacts must be mitigated with restored, enhanced or created wetlands, not with buffers.

Final Order at 79-80.²²⁴ Again, the Board's findings regarding buffers were based on substantial testimony and documents.²²⁵

²²² The Port did not assign error to this finding.

²²³ AR 014762 (Sheldon Prefiled at ¶ 18); AR 055270-272, 274, 305-306 (Sheldon, Tr., Day 2 at pp. 2-0198, line 14, to 2-0200, line 21; at p. 2-0202, lines 1-19; at pp. 2-0233 line 4 to 2-0234, line 6 (clarifying question of Board member); AR 055203, 210-214 (Azous, Tr., Day 2 at p. 2-0131, lines 15-18; at pp. 2-0138, line 7 to 2-0142, line 1); AR 056177-178 (Stockdale, Tr. Day 7 at pp. 7-0009, line 8, to 7-0010, line 6).

²²⁴ The Port did not assign error to this finding.

²²⁵ AR 014762-763, 765 (Sheldon Prefiled at pp. 10-11, 13, ¶¶ 19, 22-23; AR 014798-799 (Sheldon Prefiled at Att. B. (Sheldon Decl. in Support of Motion for Stay), pp. 12-

Further, as the Board noted, rather than calling it out as an approved practice, Ecology’s own wetland guidance document “is silent on Ecology’s current practice of granting mitigation credit for upland buffers . . .”²²⁶

4. The Clean Water Act § 401 requires “reasonable assurance” of compliance with the state law prohibition on degradation of waters of the state, including wetlands.

a. Section 401 of the Clean Water Act requires compliance with state water quality standards to protect site-specific state water resources.

The purpose of CWA § 401 is to ensure that federally permitted projects do not cause violations of state water quality standards. *Ecology v. PUD No. 1 of Jefferson County (“Elkhorn I”)*, 121 Wn.2d 179, 185-89, *aff’d*, *PUD No. 1 of Jefferson County v. Ecology (“Elkhorn II”)*, 511 U.S. 700, 704-708, 718-719, 114 S.Ct. 1900, 128 L.Ed.2d 716. It does so by requiring “reasonable assurance” that the activity as a whole will not degrade state waters to the point where chemical, physical and narrative criteria are not met. *Elkhorn II*, 511 U.S. at 712. The Board defines “reasonable assurance” to require “specific knowledge of the potential impacts from the development and meaningful means of preventing and protecting against the adverse consequences of the development. AR 000873 (PCHB Order at 100). The reasonable assurance standard derives

13, ¶¶ 13, 15); AR 055281 (Sheldon, Tr. at Day 2, p. 2-0209, lines 8-23); AR 013972-977 (Azous Prefiled at pp. 8-13, ¶¶ 11-22); AR 055222 (Azous, Tr., Day 2 at p. 2-0150, lines 5-15).

²²⁶ AR 000846 (PCHB Order at 73, citing AR 030867-913, *How Ecology Regulates Wetlands*, Ecology Pub. No. 97-112).

from the language of the federal Clean Water Act and EPA guidance. 33 U.S.C. § 1341(d); 40 C.F.R. § 121.2(a)(3)

Ecology implements § 401 by issuing the certification as a state order, pursuant to Ch. 90.48 RCW.²²⁷ The version of Washington’s water quality standards (“WQS”) applicable to the 3RW Certification were promulgated at Ch. 173-201A WAC.²²⁸ They provide explicitly for protection of fish, wildlife and recreational uses of state waters.²²⁹ The uses of Des Moines, Miller and Walker Creek for these purposes is protected by the water quality standards.²³⁰

Washington’s WQS also contain an overarching anti-degradation standard, which mandates that “existing beneficial uses shall be maintained and protected and no further degradation which would interfere with or become injurious to existing beneficial uses shall be allowed.”²³¹ The anti-degradation standard is required by EPA regulations issued pursuant to the Clean Water Act.²³² The importance of the anti-degradation concept in protecting state water resources cannot be overstated. *Elkhorn I*, 121 Wn.2d at 188-89.

Wetlands are defined as waters of the state. WAC 173-201A-030. Ecology’s guidelines explain that “the primary means for protecting water

²²⁷ AR 016888-889 (9/21/02 Letter, White to Port, attaching § 401 Certification).

²²⁸ The applicable standards are found in the record at AR 017093-109. Because new standards were adopted in July 2003, a copy of the relevant standards is attached as Appendix 4 for the Court’s convenience.

²²⁹ WAC 173-201A-100; *Elkhorn I* at 186-87.

²³⁰ AR 000816-817 (PCHB Order at 43-44); *see* ACC Op. Br. at 38-39.

²³¹ WAC 173-201A-070(1); RCW 90.54.020(2).

²³² 40 C.F.R. § 131.12; *Elkhorn II*, 114 S.Ct. at 1905-07, 1912.

quality in wetlands is to implement the anti-degradation section of the water quality standards.”²³³

The protection afforded to Washington’s water resources by the WQS is specific to the streams and wetlands that are impacted by a particular proposal; the regulations operate to protect waters *in situ*. Therefore, when assessing whether water quality is, or could be, degraded, Ecology evaluates the application of the standards on an individual water body basis. By definition, degradation of water quality in one stream or watershed cannot be mitigated by actions undertaken in an unrelated stream system elsewhere in the state. *See* ACC Op. Br. at 27-31.

b. Chapter 90.74 RCW does not -- and could not -- mandate acceptance of “mitigation” in violation of state water quality standards.

The Port attacks the Board’s findings that in-basin mitigation opportunities had not been exhausted,²³⁴ and argues that Chapter 90.74 RCW expressly requires Ecology to adopt the Port’s off-site mitigation plan. Port Br. at 45-46. However, Chapter 90.74 RCW does not require Ecology, much less the Board or appellate courts, to approve mitigation that does not satisfy the requirements of the CWA and the anti-degradation mandate of state WQS. Rather, the purpose of RCW 90.74 is to encourage agency consideration of alternative approaches to mitigation.

²³³ AR 030813 (Ecology Guidelines for Wetlands, at 3).

²³⁴ AR 000847, 854 (PCHB Order at 74, 81).

Both the Board and Ecology acknowledged this during the course of the PCHB proceedings.²³⁵ ACC Op. Br. at 28-29 and notes 39-40.

Chapter 90.74 RCW is comprised of four short sections. The first expresses legislative findings and intent, indicating that it is the policy of the state to require state regulatory agencies “to consider” alternative mitigation proposals. RCW 90.74.005(2) (emphasis added).

RCW 90.74.020 contains the action element of the statute. Project proponents may use a mitigation plan to propose wetland mitigation, and the Department of Ecology may not limit the scope of options in that plan. RCW 90.74.030(1), (2). While Ecology must “fully review and give due consideration” to a project proponent’s mitigation plan, the agency is “not required to grant approval” to a mitigation plan that the agency finds does not equal or improve biological functions and values within the watershed. *Id* (emphasis added).

Finally, in making regulatory decisions on wetland mitigation, at the request of the project proponent, Ecology must “follow the guidance” contained in RCW 90.74.005 through 90.74.020. RCW 90.74.030(1). As described above, the “guidance” does not mandate adoption of out-of-basin mitigation, but only consideration of it.

Because past practices were to “mitigate narrowly” (RCW 90.74.005(1)(a)), the statute encourages non-traditional mitigation, but

²³⁵ ACC has challenged the Board’s ruling that RCW 90.74 allows out-of-basin mitigation, insofar as that ruling constitutes *de facto* authorization of unknown, future mitigation without consideration of compliance with water quality laws. ACC Op. Br. at 27-34.

does not require it. The Legislature was also dissatisfied with the length of time required to process “innovative” mitigation proposals. RCW 90.74.005(1)(d). But again no substantive outcome overriding federal law or the state WQS is required.

The Port focuses (Br. at 45-46) on language in the Act that Ecology “may not limit the scope of options in a mitigation plan” to areas near the project site. RCW 90.74.020(2). However, the next sentence refers to mitigation “proposals,” with the paragraph as a whole directing Ecology’s review of proposals submitted by project proponents. *Id.* Read in context, this means that Ecology must consider proposals for off-site mitigation, but their review does not mean automatic approval. *Id.* The substantive requirements of the WQS remain operative, requiring site-specific compliance with the provisions of Ch. 173-201A WAC. *See* ACC Op. Br. at 29-31.

c. The Legislature cannot create an exemption to the federal Clean Water Act.

The Port would have the provisions of RCW 90.74 substitute for the requirements of the CWA. Port Br. at 45-46. The Legislature cannot, however, create an exemption from the requirements of the federal CWA. As discussed above in connection with SSB 5787, *Northern Plains Resource Council v. Fidelity*, 325 F.3d 1155, 1164-65 (9th Cir. 2003), is squarely on point. There, Montana purported to enact a statutory exemption from the discharge permit requirements of the Clean Water Act. The Ninth Circuit rejected this end-run, for two reasons.

First, the Clean Water Act specifies that states may not adopt water pollution laws and standards that are less stringent than the federal requirements. 33 U.S.C. § 1377; 40 C.F.R. § 131.4(a); *City of Klamath Falls v. Environmental Quality Comm'n*, 318 Or. 532, 546, 870 P.2d 825 (1994). Second, absent Congressional authorization, principles of federal preemption preclude any attempt to lower standards from federal thresholds.²³⁶ Here, CWA § 401 requires assurance of compliance with the site-specific anti-degradation mandate of the state WQS. Regardless of what the Legislature might otherwise find acceptable, no certification under the CWA may issue inconsistent with its mandate.

d. The Legislature cannot preemptively dictate judicial findings of fact to the PCHB and courts.

The separation of powers doctrine also bars the Port's interpretation of RCW Ch. 90.74. It is axiomatic that the legislative function is to make the law, and the judicial function is to apply it. *See* ACC's Opening Brief at 28 and section C.4, *supra*.

Here, the fundamental question adjudicated by the PCHB was whether the wetland mitigation plan offered by the Port provided "reasonable assurance" that state water quality standards would be met. To resolve this question, the PCHB as a quasi-judicial body,²³⁷ had to

²³⁶ *Northern Plains, supra, citing Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 851 (9th Cir. 2002) (recognizing that the Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law").

²³⁷ The PCHB is created pursuant to the terms of Ch. 43.21B RCW. It is a quasi-judicial administrative agency. *ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 696, 601 P.2d 501 (1979).

apply the law to evidence concerning whether the requirements of the CWA and the state WQS adopted pursuant to it and state law were satisfied by wetlands “mitigation” several miles away, outside the area where the damage would occur. No legislature may dictate the outcome of such adjudication.

e. The Board’s holding regarding out-of-basin mitigation is well-grounded in the record and the law

The Port argues that the Board’s failure to accept its proposed out-of-basin mitigation is “willful and unreasoning,” and invites the Court to reverse Condition 11 “and the erroneous conclusions on which it is based.” Port Br. at 46.²³⁸

An order of a quasi-judicial administrative board issued after due consideration is not arbitrary and capricious if there is room for two opinions, even if the reviewing court deems that the record would also support a different order.²³⁹ Here, the Auburn mitigation site constituted a dubious substitute for in-basin mitigation. *See* ACC Op. Br. at 31-34. As noted in Ecology’s wetland guidance: “It is not possible to export wetland functions and expect the watershed to remain intact.” AR 030884. While the Port may not agree with the Board’s decision that out-of-basin

²³⁸ It is unclear exactly what conclusions the Port is referring to, as the relevant section of the Port’s brief only cites conclusions with which the Port agrees. *Id.* at 45-46.

²³⁹ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 47, 959 P.2d 1091 (1998); *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn. App. 615, 623, 53 P.2d 1011, *rev. den.*, 148 Wn.2d 1017, 64 P.3d 649 (2002).

mitigation will not suffice if it is possible to provide additional in-basin mitigation, the decision is supported by substantial evidence and law.

5. Additional in-basin mitigation opportunities were available and should have been evaluated.

Board Condition 11 “urges” the Port to consider additional in-basin mitigation such as enhancing the Walker Creek headwater wetlands. The Board’s parallel legal conclusion, also part of its final Order, mandates that “out-of-basin mitigation should occur only after all reasonable in-basin options have been evaluated.” AR 000903 (PCHB Order at 130). The Board made several findings in support of this. It began by finding that state water quality standards here called on the Port to “replace all impacted wetland functions in-basin” with the exception of wildlife attractant functions. AR 000844 (PCHB Order at 71). The Board then determined as discussed above that much of the in-basin mitigation approved by Ecology was not valid as wetland mitigation.

The Board then found that, “[i]n evaluating in-basin mitigation opportunities, the Port did not fully evaluate the headwater wetland in the Walker Creek basin for its potential to serve as mitigation.” AR 000847 (PCHB Order at 74). The Board further noted that:

Testimony before the Board indicated there were opportunities for in-basin mitigation, which were apparently overlooked because they were smaller in size. For example, there appear to be in-basin mitigation opportunities as the headwater wetland in the Walker Creek basin. There appears to be other in-basin mitigation opportunities in Walker, Miller, and Des Moines Creek basins that had not been pursued as documented in a February 2000 memorandum. In identifying acreage to meet the 2:1 mitigation

ratio, the Board encourages the Port to evaluate the potential opportunities in the headwaters to Walker Creek.²⁴⁰

The evidence before the Board that all in-basin opportunities had not been fully evaluated was both substantial and telling. *See* ACC Op. Br. at 24-25 and notes 34-35. For example, Eric Stockdale, Ecology's statewide wetlands expert, had acknowledged in a February 2000 memorandum that the Port had dropped the ball on available in-basin mitigation opportunities, including a desirable wetland restoration opportunity in the headwaters of Walker Creek. AR 018438-439 (02/17/00 Stockdale Memo).

Of the four pieces of evidence cited by the Port (Br. at 43-45) in support of its challenge to the Board's findings, only one directly asserts that it was incorrect to require additional in-basin opportunities.²⁴¹ That the Board gave less weight on this point to the testimony of Dr. Kelley, and relied more on the testimony of Ecology's expert, Eric Stockdale (who was in many other respects a "friend" of the Port's proposal), is neither surprising nor objectionable. That is precisely the type of judgment fact-finders are called upon to make at trial. It was helped here by Port consultant Kelley's admission that he had rejected mitigation at the Walker Creek wetland after only viewing it from afar.²⁴²

None of the other testimony cited by the Port supports the extraordinary step of overturning the Board's findings. Eric Stockdale's

²⁴⁰ AR 000854 (PCHB Order at 81).

²⁴¹ AR 056871, *et seq.* (testimony of Port consultant James Kelley).

²⁴² AR 056874 (Kelley, Tr. Day 10, at p. 10-0029).

pre-filed testimony (AR 015691-692, cited by the Port at 46) does not discuss the question of whether other options were available, and in any event was superseded by direct and cross-examination of Mr. Stockdale at trial itself. In his direct testimony, Mr. Stockdale acknowledged the existence of a “few opportunities that provide the kind of mitigation that is proposed in the natural resource mitigation plan,” but indicated they stopped looking for such opportunities because they believed additional mitigation was not necessary. AR 056142 (Stockdale, Tr. at Day 6, p. 6-0189).

The testimony of ACC expert Dyanne Sheldon indicated that the Port self-limited additional in-basin mitigation by imposing a threshold of 10 acres, a ridiculous figure given that none of the individual elements of accepted in-basin mitigation (e.g., Vacca Farm) approaches that size. Ms. Sheldon testified that additional in-basin mitigation, even at smaller sites, would have ecological value. AR 056918-20. *See also* ACC Op. Br. at n. 34. The Port’s complaint that its controverted evidence was not accepted as conclusive is not a legal basis for second-guessing the Board’s findings. *See Bowers v. Pollution Control Hearings Bd., supra*, at 602.

a. The Port’s Own Mitigation Plan Illustrates that the FAA Wildlife Attractant Policy Is Not a Bar to In-Basin Mitigation.

The Vacca Farm site, within 10,000 feet of the Sea-Tac runways, is a centerpiece of the limited in-basin wetland mitigation proposed for the 3RW Project. AR 029349 (NRMP at p. 4-9, Table 4.1-2). It is a

convenient project for the Port, because it serves triple duty: it mitigates for wetland destruction, provides a site for the Port's re-routing of Miller Creek, and provides flood storage capacity to replace capacity lost by the construction of the Port's MSE wall. *See* ACC Op. Br. at 20 and notes 21-22. The administrative record, however, is curiously devoid of any discussion of the potential conflict between enhancing the Vacca Farm wetlands and the FAA's wildlife attractant policy. However, the Port consistently attempts to trump other potential wetland mitigation sites within the Miller, Walker and Des Moines basins, sites that would not provide a similar double benefit for the Port's industrial needs, citing the FAA policy as a bar to additional in-basin mitigation.

Ecology was not convinced when this excuse was first offered, and required the Port to look harder.²⁴³ Ecology only acquiesced in the Port's demand to stop searching for in-basin mitigation when it determined, erroneously, that the buffers and Lora Lake surface mitigation (now rejected by the PCHB) would suffice.²⁴⁴

In addressing the scope of the FAA wildlife policy, it is worthwhile to recall the importance of restoring and enhancing in-basin wetland resources. *See* ACC's Opening Br. at 16 and n. 16. In sum, the wetlands that the Port proposes to destroy provide important functions as a part of the Miller and Des Moines stream systems. As ACC expert Amanda Azous testified, "[m]any of the threatened wetlands provide

²⁴³ AR 056127 (Stockdale, Tr. at Day 6, p. 6-0174, lines 5-23).

²⁴⁴ AR 056199 (Stockdale, Tr. at Day 7, p. 7-0031, lines 7-23).

important functions particularly valuable in the urbanized environment surrounding the airport.” AR 013968. It is hornbook wetland science that a new wetland, outside the watershed, offers nothing by way of protection to the water quality and habitat values of in-basin streams. AR 030844. Restoration of in-basin wetlands serves the specific purpose of preventing degradation of Miller, Walker and Des Moines Creeks in violation of state water quality standards.²⁴⁵

The FAA wildlife policy recommends that wetland mitigation for public use airports “should be designed so it does not create a wildlife hazard” and that “wetland mitigation projects that may attract hazardous wildlife be sited outside” the 10,000 foot zone surrounding the airport. AR 040508. This policy recognizes that wetland mitigation can be specifically designed to not attract wildlife. The Port acknowledges that this can be accomplished in the limited in-basin wetland mitigation it has proposed.²⁴⁶

The Port also argues that creation of new in-basin wetlands is forbidden by the FAA Record of Decision for the Third Runway. Port Br. at 46. This assertion is beside the point. The search for in-basin mitigation focuses on restoring and enhancing existing wetland sites, not creating new, man-made wetlands.²⁴⁷ The Board did not order the Port to create new wetlands. Rather, it ordered the Port to evaluate the potential

²⁴⁵ WAC 173-201A-070. See ACC Op. Br. at 34-37.

²⁴⁶ AR 000844 (PCHB Order at 71); see ACC’s Op. Br. at 34-37.

²⁴⁷ See, generally, AR 029353 (NRMP Table 4.1-3); AR 013972 (Azous Prefiled at p. 8, ¶ 11, Table 1).

for improving the function of existing wetland sites, consistent with the work the Port is already proposing for Vacca Farm.²⁴⁸

The Board's determination that the FAA wildlife hazard policy and the FAA Record of Decision do not prevent additional in-basin mitigation is supported by a close but clear reading of those documents, by the anti-degradation requirements of state water quality law (WAC 173-201A-070), and by the Board's assessment of the facts surrounding in-basin mitigation possibilities. It should be upheld by this Court.

H. The PCHB Properly Interpreted Clean Water Act § 401 and Its Own Rules of Procedure to Require Review of § 401 Certifications to Be Based Upon the Record Available to Ecology at the Time of Certification

Our State Legislature created the PCHB to:

provide for a more expeditious and efficient disposition of appeals with respect to the decisions and orders of the Department [of Ecology] and director and with respect to all decisions of air pollution control boards ...

RCW 43.21B.010. The Legislature further provided broad authority to the PCHB to adopt rules of practice and procedure:

All proceedings before the hearings board or any of its members shall be conducted in accordance with such rules of practice and procedure as the hearing board may prescribe. The hearings board shall publish such rules and arrange for the reasonable distribution thereof.

RCW 43.21B.170. Pursuant to this grant of authority, the PCHB adopted WAC 371-08-485 entitled "Standard and Scope of Review and Burden of

²⁴⁸ AR 000903 (PCHB Order at 130).

Proof at Hearings” which states in pertinent part that: “Hearings shall be formal and quasi-judicial in nature. The scope and standard of review shall be *de novo* unless otherwise provided by law.” WAC 371-08-485(1).

Based on the “otherwise provided by law” language in this rule, the PCHB concluded that:

Because the Clean Water Act and applicable federal regulations require Ecology to have reasonable assurance in order to issue a legally defensible water quality certification, this board’s *de novo* review of § 401 certifications must be based upon the record before Ecology at the time the certification is issued. To hold otherwise would blur the distinction between Ecology and the Board’s statutory roles, ignore the requirements of the Clean Water Act, and foster issuance of speculative and incomplete permits.²⁴⁹

In its Opening Briefs, ACC and CASE argued (CASE Op. Br. at pp. 46-49) that the PCHB properly concluded that its *de novo* review of the Ecology § 401 certification was to be based upon the record as it existed at the time of certification by Ecology. However, ACC pointed out that the Board had then erred in applying this standard when it nonetheless accommodated the Port and considered post-certification plans, analyses and reports:

Ecology and the Board may rely on the conditions, which require completion of post-certification studies, plans and reports so long as the implementation and outcome of those post-certification studies, plans and reports meet the same reasonable assurance test.²⁵⁰

²⁴⁹ AR 867 (PCHB Order at p. 94).

²⁵⁰ AR 868 (PCHB Order at p. 95).

Ecology (Br. at pp. 48-53) and the Port (Br. at pp. 53-58) both argue that the PCHB erred in limiting the scope of its review in this case. The Port and Ecology both cite *Barrish & Sorenson Hydroelectric Co. v. Ecology*, PCHB No. 94-193 (1995), to argue that the Board's *de novo* review was to be based on the proposed project "as presented to the Board." The PCHB Order explains the difference between the *Barrish* case and the Third Runway § 401 certification, and the scope of issues presented in the two cases:

Barrish & Sorensen Hydroelectric involved a project far smaller in scope and complexity than the proposal here and the parties did not address, nor did the Board consider or analyze, how the Board's *de novo* review of the § 401 certifications is limited as "otherwise provided by law." WAC 371-08-485.²⁵¹

Clearly, in *Barrish*, no circumstances arose in which the Board had to resolve the question of whether to review what Ecology had before it or something more. The Port argues (Br. at p. 55) that the Board erred by applying its procedural rules which "govern its standard of review, instead of the provisions of the APA that govern its scope of review." This argument ignores the plain language of the PCHB rule at issue, which clearly addresses both the standard and scope of review in actions before the Board: "The scope and standard of review shall be *de novo* unless otherwise provided by law." WAC 371-08-485. The Port (Br. at 55) and Ecology (Br. at 50) both argue that the APA requires the Board to base its

²⁵¹ AR 000866 (PCHB Order at p. 93).

decision on evidence presented at the hearing (Brief at p. 55) and cite the following portion of the APA:

To the extent necessary for full disclosure of all relevant facts and issues, the presiding officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence....²⁵²

The Port and Ecology ignore the key qualifying language of this statute which limits the scope of evidence presented at a hearing to “all relevant facts and issues.” In review of a CWA § 401 certification, the relevant facts and issues are those addressing whether Ecology had reasonable assurance of compliance with water quality standards for the § 401 Certification it issued. The Board’s construction of its own rule, WAC 371-08-485, is consistent with RCW 34.05.449(2).

Ecology also argues (Br. at p. 52), misunderstanding a portion of the Board’s Order, that there is no authority for a “variable scope of review based upon the size or complexity of the project under review.” However, the Board was not mandating a variable scope of review. Rather, it was explaining why, as a practical matter, the issue presented here had not squarely arisen before. It is the rare applicant which follows the Port’s practice of submitting successive versions of key § 401 documents including months after Ecology has issued its certification and even while the matter is pending on appeal before the PCHB.

The Board was concerned that such a practice “blurs the distinction between Ecology and the Board’s statutory roles.” AR 000867 (PCHB

²⁵² RCW 34.05.449(2) (emphasis added).

Order at p. 94). The Board cannot provide “uniform and, independent review of Ecology actions” (*id.*) when the application and Ecology’s action on it are a moving target.

The Port (Br. at p. 57) and Ecology (Br. at p. 53) argue that Clean Water Act § 401 appeals are no different from other types of appeals heard on an open record before the Board such as water rights applications pursuant to RCW 90.03.290 or notices of water quality violations under RCW 90.48.120(1). But review of a CWA § 401 Certification is fundamentally different: it involves a certification at one point in time of whether assurance exists.²⁵³

The one-time window of opportunity for the state to ensure that projects requiring federal permits or approvals comply with state water quality standards makes clean water act § 401 certifications different from the other types of permit decisions reviewed by the PCHB.

Finally, the Port (Br. at p. 58) and Ecology (Br. at p. 53) both point to only three states which they say do not construe CWA § 401 as limiting the scope of review of a § 401 certification. However, none of these involved an agency rule like the one at issue here, WAC 371-08-485. Moreover, the issue presented in this case, the impact of the language of CWA § 401 itself on the scope of review was not addressed in those instances.

²⁵³ AR 014402 (Declaration of Thomas Luster, p. 8, ¶ 18) (emphasis added). As another example, although the PCHB reviews Clean Water Act § 402 (National Pollutant Discharge Elimination System or “NPDES”) permit decisions, NPDES permits are subject to periodic review. WAC 173-220-180(1) (permits shall be issued for fixed terms not to exceed five years).

III. CONCLUSION

ACC and CASE respectfully request that the Court dismiss respondents' petitions for review and deny the claim that SSB 5787 renders any portion of the PCHB decision "moot."

RESPECTFULLY SUBMITTED this _____ day of September, 2003.

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