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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

AIRPORT COMMUNITIES COALITION,

Plaintiff,

v.

COLONEL RALPH H. GRAVES,  
Commander and District Engineer of the  
Seattle District, United States Army Corps of  
Engineers; UNITED STATES ARMY CORPS  
OF ENGINEERS, an agency of the United  
States government; and PORT OF SEATTLE,  
a municipal corporation,

Defendants.

No. CV02-2483R

PLAINTIFF ACC’S MOTION FOR  
RECONSIDERATION

NOTE ON MOTION CALENDAR:  
August 29, 2003

**I. INTRODUCTION AND RELIEF REQUESTED**

Plaintiff Airport Communities Coalition (“ACC”) respectfully requests that the Court reconsider its Order Granting Defendants’ Motions for Summary Judgment and Denying Plaintiff’s Motion for Summary Judgment (the “Order”). In its Order, the Court focuses on the one-year period following notice of the application as the critical period for state 401 certification action. Yet, the Order fails to address at all the legal effect of the State Pollution Control Hearings Board’s (“PCHB”) Order Granting Motion to Stay the Effectiveness of Section 401 Certification (the “Stay Order”) which was issued within the initial one-year period.<sup>1</sup> In effect, this final word from the

<sup>1</sup> The Stay Order is attached as Exhibit A.



1 State of Washington on the Port's request for certification within the initial one-year period was a  
2 denial of the Certification which, under the terms of the Clean Water Act and in light of this Court's  
3 decision, should have precluded § 404 approval by the Corps.

4 Overlooking the effect of the PCHB's December 17, 2001, Order is understandable in light  
5 of the thousands of pages of record and layers of arguments which this Court was asked to address.  
6 Nonetheless, it does fall within the type of "manifest error" for which reconsideration is  
7 appropriate.<sup>2</sup> ACC therefore respectfully requests that the Court grant its motion for reconsideration  
8 and remand the matter to the Corps with direction to deny the CWA § 404 permit based upon the  
9 PCHB's December 17, 2001, Stay Order, issued within the initial one-year notice period. In the  
10 alternative, ACC respectfully requests that the Court remand the matter back to the Corps with  
11 direction to incorporate into the CWA § 404 Permit all the PCHB's modified conditions which were  
12 preconditions to lifting the PCHB's December 17, 2001, Stay Order.

## 13 II. AUTHORITY AND ARGUMENT

14 Local Rule 7(h) permits motions for reconsideration in cases of "manifest error."

15 Section 401 of the Clean Water Act provides in pertinent part:

16 If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act  
17 on a request for certification, within a reasonable period of time (which shall not exceed  
18 one year) after receipt of such request, the certification requirements of this subsection  
19 shall be waived with respect to such Federal application. No license or permit shall be  
20 granted until the certification required by this section has been obtained or has been  
21 waived as provided in the preceding sentence. No license or permit shall be granted if  
22 certification has been denied by the State, interstate agency, or the Administrator, as the  
23 case may be.

24 33 U.S.C. § 1341(a)(1) (emphasis added).

25 In this case, the Court should reconsider its Order because it was manifest error for the Court  
to establish a one-year bright-line rule for State action on the CWA § 401 Certification, yet fail to

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<sup>2</sup> The effect of the PCHB Stay Order was raised in plaintiff's Motion for Summary Judgment (at p. 13)—and in the record. See AR 46125-22.

1 address the legal effect of the final word from the State of Washington on the CWA § 401  
2 Certification that occurred within the one-year period.

3 In this case, because the last word from the State of Washington within the one-year period  
4 following the public notice was a stay which set aside the Clean Water Act § 401 certification and  
5 which had the effect of a denial, the plain language of CWA § 401 required the Corps to deny the  
6 § 404 permit.

7 The Corps issued its final public notice for the Port of Seattle’s (“Port”) CWA § 404 permit  
8 application on January 17, 2001. This notice also stated that it “served as notification of a request to  
9 the State of Washington, Department of Ecology, for water quality certification [pursuant to Clean  
10 Water Act § 401] . . .” AR 034299. As acknowledged by the Corps in its Record of Decision  
11 (“ROD”), the one-year time period for the State to act upon the request for certification commenced  
12 on the date of the January 17, 2001, public notice. AR 053967.

13 As this Court notes in its Order (at p. 9), the Washington State Department of Ecology  
14 (“Ecology”) issued its certification decision on September 21, 2001, within the one-year time  
15 period. However, this Court fails to address the legal effect of the PCHB’s subsequent Order, which  
16 also occurred within one year of the public notice, on December 17, 2001. AR 046948-928.

17 The December 17, 2001, PCHB Stay Order explicitly was issued to:

18 assure the Board’s ability to render a meaningful decision on the merits . . . the potential  
19 issuance of the 404 permit during the pendency of this appeal warrants the Board’s  
20 determination that failure to stay the effectiveness of the § 401 Certification could cause  
irreparable harm to the wetlands proposed for filling.

21 AR 046104-03 (Stay Order at pp. 18-19). The Order was clear about its effect. “Based on  
22 the foregoing, the Board hereby grants Appellant’s motion to stay the effectiveness of § 401  
23 Certification No. 1996-5-02325 (amended-1) . . .” AR 046104 (*Id.* at 20) (emphasis added). The  
24 basis for the Board’s decision was the potential for the project to violate state water quality  
25 standards, in contravention of federal and state water quality laws. AR 046110, 046108, 046107  
(*Id.* at 12 (lines 10-14), 14 (lines 6-13), 17 (lines 7-14).) Thus, on January 16, 2002, one year after

1 the public notice of application, a valid § 401 Certification for the project not only did not exist, but  
2 was explicitly rejected by the Board as violative of the Clean Water Act requirement that the  
3 federally permitted discharge must comply with state water quality standards. 33 U.S.C. §  
4 1341(a)(1).

5 Thus, within the initial one-year period deemed critical by this Court, the state acted to take  
6 jurisdiction under CWA § 401 and then, having acted within that one year, ordered (in the form of  
7 the PCHB December 17 Order) that the state decision be deemed a denial until the further notice.  
8 And, it made clear that it was doing so explicitly to prevent the outcome which the Court's recent  
9 decision would create. The PCHB issued its Findings of Fact, Conclusions of Law, and Order on  
10 August 12, 2002. AR 052386-248. As part of this decision, the Board lifted its prior Stay Order  
11 preconditioned upon the modification of Ecology's initial certification decision. The Board found  
12 the preconditions necessary to meet the CWA § 401 standard of "reasonable assurance the  
13 construction of the Port's proposed improvements at the airport will comply with state water quality  
14 standards." *Id.*

15 If this Court is to adopt a bright-line rule that the Corps is only required to honor State  
16 Certification decisions made within the initial one-year period, then the State of Washington's final  
17 word within that year was a denial of certification of the project. That denial remained in effect  
18 until conditionally lifted. The practical effect of the Court's Order therefore is to allow the Port and  
19 the Corps the benefit of the PCHB's decision to conditionally lift its December Stay Order, while  
20 allowing the Corps to disregard the *quid pro quo* (the modified conditions) for lifting the stay. This  
21 outcome is impermissible under the Court's reading of the Act.

22 Under § 401(a)(1) of the Act, the Corps lacks authority to further process a § 404  
23 application and issue a § 404 approval where the state has taken jurisdiction and ordered a § 401  
24 certification denial within the initial one-year period. 33 U.S.C. § 1341(a)(1). If the Corps is to be  
25 allowed to move ahead in disregard of the state Order staying the § 401 Certification, issued within  
the initial one-year period, it may only do so by complying with the conditions under which the

1 state (outside of the one-year period) lifted its Order. Allowing the Corps to have it both ways is  
2 inconsistent both with the Act and with the logic of this Court's August 18, 2003, decision.

3 Even the Corp's own Regulatory Guidance Letter ("RGL") 87-03 suggests that the Corps  
4 must either deny the § 404 permit, based upon the PCHB Stay Order setting aside the Ecology  
5 certification or, at minimum, honor the conditions precedent to "legally revive" Ecology's  
6 Certification. The RGL provides that the Corps "cannot issue the permit" if the § 401  
7 certification is "set aside" within the one-year period "unless and until the 401 certification is  
8 legally revived." On its face, RGL 87-03 therefore establishes that the Corps *could not* issue the  
9 permit in this case until the PCHB issued its Final Order modifying the certification and lifting  
10 its December 17 Order.<sup>3</sup>

#### 11 IV. CONCLUSION

12 For the reasons set forth above, ACC respectfully requests that the Court reconsider its  
13 Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for  
14 Summary Judgment. Based upon the PCHB's December 17, 2001, stay setting aside the Ecology  
15 Certification approval, which did occur within the one-year period following the Corps' January 17,  
16 2001, public notice, the Court should remand this matter back to the Corps with direction to deny  
17 the § 404 Permit. Alternatively, the Court should remand this matter back to the Corps with  
18 direction to the Corps to include all of the PCHB's modified conditions in its August 12, 2002,  
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21 <sup>3</sup> The Washington Legislature has established the PCHB as a quasi-judicial body with specialized expertise  
explicitly to:

22 provide for a more expeditious and efficient disposition of appeals with respect to the  
decisions and orders of the department ...

23 RCW 43.21B.010. Numerous other states have wisely vested initial review of § 401 certifications in expert  
24 tribunals like the PCHB, rather than trial courts of general jurisdiction. *See, e.g.*, Colo. Rev. Stat. §25-8-202(1)(k);  
25 Ind. Code § 4-21.5-7-3; Mont. Code Ann. § 75-5-403(2); Ohio Rev. Code Ann. § 3745.04; Or. Rev. Stat. § 468.070;  
25 Pa. Code Ch. 1021; Tenn. Code Ann. § 69-3-105(f); 10 Vt. Stat. Ann. § 1004. Many other states require a  
dissatisfied applicant to pursue a formal evidentiary hearing before the certifying agency or its internal appeals  
board before seeking judicial review. The Corps and this Court may no more disregard the PCHB's Order than it  
could any other order from a state or federal court.

PLAINTIFF'S MOTION  
FOR RECONSIDERATION- 5

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1 Order, as imposition of those modified conditions was a condition precedent to the PCHB's Order  
2 lifting the December 17, 2001, Order.

3 Respectfully submitted this \_\_\_\_\_ day of August, 2003.

4 HELSELL FETTERMAN LLP

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6 \_\_\_\_\_  
7 PETER J. EGLICK, WSBA #8809  
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11 ADAM J. BERGER, WSBA # 20714

12 Counsel for Plaintiff  
13 Airport Communities Coalition

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PLAINTIFF'S MOTION  
FOR RECONSIDERATION- 6

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