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.

RESPONDENT/CROSS-PETITIONER AIRPORT COMMUNITIES COALITION'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF PURSUANT TO RAP 8.3

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I. Identity of Moving Parties

Respondent/cross-petitioner Airport Communities Coalition ("ACC") hereby moves the Court for the relief identified in part 2 of this motion.

II. Statement of Relief Sought

ACC requests that the Court grant emergency injunctive relief pursuant to RAP 8.3 in order to preserve the fruits of its appeal pending the Court's decision. These consolidated appeals were argued November 18, 2003. Specifically, ACC requests that the Court enjoin the Department of Ecology ("Ecology") from approving any embankment construction or placement of fill until the pending appeals are resolved by the Court and a mandate terminating review is issued. Similarly, ACC requests that the Court enjoin the Port of Seattle ("Port") from taking any action such as placing any fill at the Third Runway Project site, filling any area wetlands, or altering/relocating any area steams.

ACC seeks the relief now because public records and bid announcements reflect that the Port will begin deposit of fill and construction of the project "in April" despite the fact that a decision from this Court is pending but has not yet issued.

III. Facts Relevant to Motion

The underlying appeals here concern the Pollution Control Hearings Board's ("PCHB") imposition of sixteen conditions to project clean water on the Department of Ecology's approval of the Port's proposed construction of a third runway and related projects at Sea-Tac

Airport (the "Third Runway Project"). One of the main issues before the Court concerns PCHB Condition No. 8, prohibiting use of the "Synthetic Precipitation Leaching Procedure" or "SPLP" to approve fill material for the project which exceeds limitations on toxic pollutants (such as heavy metals). Both the Port and Ecology appealed Condition 8. An equally significant issue in the appeal pertains to the legality of the Port's proposed mitigation for destruction of wetlands and stream alterations in the face of insufficient and out-of-kind mitigation. The PCHB held Ecology's calculation of wetland mitigation was incorrect and that more in-basin mitigation was required. The Port has appealed this portion of the PCHB's decision. ACC also appealed, arguing that the Port's proposal for wetland destruction and stream alteration did not meet the requisite standard of reasonable assurance that water quality standards would not be violated.

Through the course of this litigation ACC had understood that no construction activity would occur at the site that would prejudice the ability of the Court to provide effective relief. However, ACC now understands that such construction activity -- including filling of wetlands -- is contemplated "in April" (i.e., this month), that the Port has not identified and planned for additional in-basin mitigation (as required by

the PCHB), and that the Port plans to use the SPLP testing procedure to approve fill for the site.

A. The Port is Preparing to Place Fill Using the SPLP Procedure Prohibited by the PCHB

The quality of the fill used for the Third Runway Project is critical because the project, if it goes forward, will both displace and be adjacent to streams and wetlands. The imported material would be used to fill a deep wooded canyon west of the existing runway to create a flat surface level to the existing runways. The embankment would contain more than 20 million cubic yards of fill.[1] It is not merely speculation that groundwater infiltrating through the massive embankment will reach streams and wetlands below -- the Port's plan to offset the stream flow impacts (caused by filling a significant portion of the existing watershed) depends upon it.

To uphold Ecology's certification of the Port's project, the PCHB was required to conclude that there was "reasonable assurance" that the project would comply with water quality laws and, in particular, state water quality standards. 33 U.S.C. § 1341(d); 33 CFR § 320.4(d). In the case of the Port's Third Runway Project, those standards are high because, as noted, area streams are classified as Class AA waters, and the

[1] AR 000785 (PCHB Order at 12). According to Ecology, 20 million cubic yards of fill is the equivalent of 40 football fields each piled 300 feet deep. AR 027998-999 (Ecology Press Release, dated August 10, 2001).

applicable water quality standards include an explicit prohibition against degradation.[2] Washington's overarching water quality anti-degradation mandate also applies:

> 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.[3]

After conducting a two-week trial, hearing testimony and cross-examination of some 30 expert witnesses, and reviewing a record surpassing 50,000 pages, the PCHB concluded that the project could not proceed absent sixteen protective conditions necessary for the project to meet the reasonable assurance standard. AR 000908-911 (PCHB Order at 135-138).

For example, the original Certification issued by Ecology on August 10, 2001, had a straightforward testing procedure to ensure that groundwater and surface waters were not degraded by fill placement. Fill soil was tested to determine milligrams of toxic contaminants per kilogram of soil ("mg/kg"). The results were compared to numeric limits for certain heavy metals, gasoline, diesel and heavy oils. When the Port appealed to

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[2] For example, in Class AA waters, such as Des Moines, Miller and Walker Creeks, state water quality standards require that, "Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses." WAC 173-201A-030(1)(a).

[3] WAC 173-201A-070(1); *see also PUD No. 1, et al. v. Washington Department of Ecology, et al.*, 511 U.S. 700, 719 (1994); *see Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 192 (1993) (holding that anti-degradation standard was appropriate basis for imposing minimum stream flow condition).

the PCHB Ecology's initial August 10 Certification, Ecology issued a new one, more to the Port's liking. That new, September 21, 2001, Certification included a second-chance plan for approving fill containing toxic contaminants in excess of the established limits. That plan, drafted by one of the Port's lawyers and adopted by Ecology, employs a Synthetic Precipitation Leaching Procedure ("SPLP").[4]

After hearing testimony and reviewing the record, which demonstrated that the Port's SPLP procedure had already been used to excuse importation of admittedly contaminated material to the Airport site,[5] the PCHB (in Condition 8 of its decision) prohibited its use. AR 000910 (PCHB Order at 137).

Both the Port and Ecology appealed PCHB Condition No. 8 to this Court. However, neither the Port nor Ecology ever sought or obtained modification of the PCHB Order barring SPLP use, which therefore remains in effect.

The Port and Ecology did support, in the 2003 legislative session, Substitute Senate Bill ("SSB") 5787, which provides, in pertinent part:

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[4] *See* ACC/CASE Response Br. at pp. 16-24 for a full discussion with detailed record citations of the background concerning Ecology's issuance of an initial Certification without the SPLP procedure, and then a second Certification containing the SPLP procedure.

[5] *See* ACC/CASE Response Br. at pp. 19-20.

> (1) In order to ensure that construction projects involving the use of fill material do not pose a threat to water quality, the 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.[6]

ACC responded to passage of SSB 5787 by filing a Petition Against State Officer with the Supreme Court, Case No. 74039-9, asking for immediate relief because imminent harm would occur if Ecology used the legislation as an excuse to ignore the PCHB's SPLP prohibition, which was binding unless overturned by this Court.

Ecology and the Port sought dismissal of ACC's Petition, arguing *inter alia* that the issues raised by the legislation were already to be addressed in this action. The Supreme Court Commissioner ultimately

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[6] Airport Communities Coalition's First Amended Petition Against State Officer, Supreme Court Case No. 74039-9, at Appendix 1-J (Laws of Washington 2003, Chapter 210 (Substitute Senate Bill No. 5787), signed by the Governor on May 9, 2003) (emphasis added).

agreed and granted dismissal, but only upon the explicit 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.

Declaration of Peter J. Eglick in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Emergency Motion for Injunctive Relief Pursuant to RAP 8.3 ("Eglick Decl."), Exhibit B (July 11, 2003, Ruling Dismissing Original Action, Supreme Court Case No. 74039-9).

In dismissing ACC's separate Petition, the Court Commissioner also explicitly relied on Ecology assurance that no action based on the legislation would occur in the near term:

> Should circumstances require, the Coalition may apply to this court for injunctive or other relief pending the decision in the appeal. At this time the Department of Ecology does not contemplate taking any immediate action based on SSB 5787, however.

Id. at p. 2 (emphasis added).

Recently, ACC has obtained public records which indicate that the premise conveyed by Ecology to the Commissioner no longer applies. They indicate that Ecology has, in coordination with the Port and without notice to the public, the PCHB, ACC or the Court, authorized a Work Plan allowing the Port to use the SPLP procedure (barred by the PCHB Order)

to approve contaminated fill for the project, including nine million cubic yards of fill for which a contract will be imminently awarded. As the public disclosure documents disclose, Ecology approved this SPLP Work Plan within three months of its representations to the Supreme Court Commissioner that no "immediate" action was contemplated.

One of the documents obtained under the PDA is the "Work Plan to Qualify Fill Materials, Third Runway and Related Projects, submitted to Ecology by the Port and dated October 3, 2003." (Eglick Decl., Ex. C). Section 3.5 of the Work Plan ("Supplemental Analyses") specifically authorizes use of the SPLP loophole which the PCHB prohibited:

> If the 95% UCL for a metal exceeds the respective fill criterion and is below the Upper Bound Limit (defined below), the prospective fill source supplier may use the Synthetic Precipitation Leaching Procedure (SPLP) ...

Ex. C (Work Plan) at p. 21. Further, the end of Section 3.5, Table 7, Applicable Water Quality Criteria for Comparison Against SPLP Results, lists a completely different set of toxic contaminant limits for fill, most of which are higher (i.e., less protective) than the PCHB-imposed criteria. Work Plan at p. 23.

Additionally, while the Introduction to the Work Plan states that, "This Work Plan is prepared to satisfy Ecology and the Pollution Control Hearings Board (PCHB) requirements regarding the quality of fill

imported for 404-projects construction" (Work Plan at 1), it then goes on to state:

> Chemical testing is conducted on specific geologic units so that the soil quality of a prospective fill source will be known in advance of its import for construction. In addition, Synthetic Precipitation Leaching Procedure (SPLP) testing is included as a supplemental test for cases where uncontaminated potential fill sources are, based on their natural mineralogic composition, unable to meet the PCHB fill criteria for certain metals.

Work Plan at p. 2 (emphasis added).

Clearly, the Work Plan includes use of the SPLP procedure to allow placement of contaminated fill materials, in direct violation of the PCHB Order.

B. Port Issues Bid Notice for 2004-05 Embankment Construction

Not coincidentally, in October, 2003, the Port issued a bid notice for the "Third Runway - 2004-05 Embankment/S. 154th St. Construction" (Eglick Decl., Ex. D), including for the following work:

> Clearing and grubbing approximately 150 acres, construction of embankments comprising approximately 9,000,000 cubic yards, onsite excavation of 3,300,000 cubic yards, off-site import of 6,000,000 cubic yards, and removal and replacement of approximately 500,000 cubic yards of material for subgrade improvements.
>
> Construction of approximately 200,000 SY of mechanically stabilized retaining walls.
>
> Relocation of South 154th Street and 156th Way from Des Moines Memorial Drive to 24th Avenue South.

> Associated work includes, but is not limited to, drainage, water, sewer and other utility installations; bridge construction; illumination installations; landscaping and temporary erosion and sediment control. Temporary erosion control measures including the expansion of 4 major sedimentation ponds, construction of 1 temporary sedimentation pond, construction of 1 treatment cell, as well as 2 minor pump ponds.

Eglick Decl., Ex. D (October 22, 2003, Bid Notice), at p. 2. This comprises a major portion of the 23-million-cubic-yard embankment for the Third Runway.

There is no question that Ecology approved the Port's Work Plan, including use of SPLP, so that it could be used for this bid. In an email dated November 4, 2003, recently obtained pursuant to the Public Disclosure Act, Ann Kenny, Ecology's coordinator for the Port's Third Runway Project, lists duties she performed related to the third runway project, including:

> Approved Port's Fill Sample and Analysis Plan (see letter dated October 1, 2003).[7]

Eglick Decl., Ex. E at p. 3. In a subsequent email dated December 8, 2003, Ms. Kenny specifically discusses a Port/Ecology bid review process

[7] Ms. Kenny's wording confirms that Ecology was in the process of approving violations of the PCHB decision within two months or less of the Supreme Court Commissioner's Order. In fact, Ms. Kenny's November 4 email (Ex. E) states, under the heading of August 2003, that the "Majority of time this month spent on coordinating Ecology's review of the Port's Fill Sample and Analysis Plan" -- i.e., the very next month following the Commissioner's Order reflecting Ecology's representation to him.

and again mentions that Ecology had approved the Port's fill sampling plan for the bid:

> I need a consultant in two areas: (1) To review the top three bid proposals the Port receives to ensure that the fill that has been identified meets the criteria established in the 401, as modified by the PCH[B] (and the approved sampling and analysis plan that Pete Kmet helped me with);

Eglick Decl., Ex. F.

Further, an Ecology "Project Overview" dated January 30, 2004, for the Third Runway Fill Bid Package Review and Third Runway Embankment Fill Monitoring Plan Review (Eglick Decl., Ex. G) addresses an agreement between the Port and Ecology for Ecology to review the embankment bid materials for, *inter alia,* placement of nine million cubic yards of fill, and explicitly acknowledges that Ecology's review will be based upon the October Work Plan which incorporates the SPLP test loophole which the PCHB Order prohibits:

> A. Fill Bid Package Review: The 401 Water Quality Certification issued to the Port of Seattle (Port) for construction of the Third Runway at the Seattle-Tacoma International Airport requires the Port to submit information regarding fill sources to the Department of Ecology for review and approval in advance of placement on-site. The Port, in its recent RFP/RFQ, has required potential bidders to identify potential fill sources and to evaluate them for compliance with the fill criteria using a Work Plan approved by Ecology (*Work Plan To Qualify Fill Materials*, Aspect, October 3, 2003 Final, see attached). Bid packages are due to the Port at the end of February 2004. The Port will evaluate the bid packages and fill sources for compliance with the bid specs and the approved Work Plan. The Port will forward the top three packages to

> Ecology on or about March 5, 2004 for Ecology concurrence that the identified fill sources meet the fill criteria as defined in the Work Plan. Ecology has agreed to provide the results of its review to the Port at the end of a ten (10) calendar-day review period.

Eglick Decl., Ex. G (Project Overview), at p. 1.

C. Construction Is Imminent Even Though Issues of Wetland and Stream Destruction and Mitigation Are Still Pending

The PCHB's Order also required the Port to amend its plan to mitigate wetland impacts:

> 11. The Port shall mitigate for on-site wetland loss at the ratio of no less than 2:1. This ratio shall not include wetland buffers or preserving wetlands that are already protected. In order to meet this ratio, the Port is urged to consider enhancing the Walker Creek headwaters wetlands

PCHB Order at p. 137, Condition 11 (AR 000910). The PCHB consequently ruled out as illusory significant elements of the Port's proposed mitigation for wetland destruction, effectively requiring additional mitigation:

> The 112.75 acres of on-site mitigation, minus the 3.06 acres for the surface of Lora Lake, equals 109.69 acres of mitigation or 33.38 acres of mitigation credit. Of the 109.69 acres, 54.93 acres are buffer enhancement (counted as 10.99 acres of mitigation credit). If the buffer enhancement and the 23.55 acres for preservation of the forested wetland and buffer are removed, the NRMP includes 31.21 acres of mitigation or 20.05 acres of mitigation credit. This amount is insufficient to meet the 2:1 ratio and to mitigate for the 21.34 acres of wetland impacts. The Board finds the Port has not yet fully mitigated the impacts to the filled wetlands and wetland functions.

PCHB Order at pp. 80-81 (AR 000853-854) (emphasis added).

The Port appealed PCHB Condition 11. ACC also appealed the PCHB's findings and conclusions related to condition 11, arguing that the PCHB had not gone far enough because the Port has still been given too much credit for some of its proposed mitigation.

ACC has now received documents -- produced by Ecology in response to a PDA request -- indicating that Ecology has not required the Port to locate or evaluate potential new mitigation areas. In fact, the documents indicate that such work has been relegated to a "contingency" role, as if compliance with the PCHB Order now in effect is not required unless this Court upholds it. Meanwhile, the Port (with Ecology's complicity) rolls on toward construction.

For example, the public disclosure documents recently obtained show that on August 18, 2003, Ecology's wetland consultant, Katie Walter of Shannon & Wilson, outlined anticipated tasks between September 2003 and June 2005:

> Additionally, because the 401 decision was appealed, depending on the appeal outcome, additional revisions to the NRMP may be required. This estimate includes a very limited amount of review time for potential revisions.

Eglick Decl., Ex. M at attached Letter from Katie Walter to Ann Kenny dated August 15, 2003, at p. 1 (emphasis added).

The Port's Robin Kordik has noted in communicating with Ecology concerning possible revisions to the Port's wetlands destruction and mitigation plan:

> *This task is also a contingency task, when the court rules in our favor, there is no work to do.*

Eglick Decl., Exhibit N (Email dated August 27, 2003, from the Port's Robin Kordik to Ecology's Ann Kenny, Re: Revised Work Plan, at attachment (Port Comments, Revised Work Plan), pp. 1-2 (italics in original; underlining added).

Ms. Kenny sent another email to Ms. Kordik regarding the Revised Work Plan on November 4, 2003. Eglick Decl., Ex. O. In it, Ms. Kenny states:

> The costs you see [in the Revised Work Plan] are based on finishing up NRMP work which can happen shortly after we get the new contract signed and on the assumption that construction oversight will be necessary beginning in April.

Ex. O (emphasis added). In sum, Ecology is assuming that construction will begin in April -- apparently without regard to preserving the status quo pending this Court's decision and without regard to compliance with the PCHB conditions.

D. Ecology Has Been Unable to Give Timely Assurance that the Status Quo Will Be Maintained

On March 5, 2004, the Port closed the bid process for the 2004-05 Embankment work.[8] Per the Project Overview, Ecology review and approval of these bids was then to occur on a ten-day timeframe. The urgent nature of this matter -- and of the need for action by this Court -- is clearly spelled out in an email from Ms. Kenny dated December 1, 2003, recently obtained under the Public Disclosure Act:

Construction could begin in April.

Eglick Decl., Ex. J (emphasis added). Given the location of project area wetlands, the quantity of fill already on site and the volume of fill anticipated for delivery pursuant to the current construction schedule, it is likely, if not unavoidable, that the Port will commence filling wetlands before the Court rules on the merits of the pending appeals.

The facts outlined above -- based on the documents ACC recently obtained from Ecology via PDA request -- were laid out to Ecology in a letter dated March 19, 2004, from ACC counsel to Ecology counsel. Eglick Decl., ¶ 3 and Ex. A. ACC's March 19 letter requested a response (definitive assurance that the status quo would be preserved) from the Attorney General's Office by the close of business on Friday, March 26,

[8] *See* Eglick Decl., Ex. H (Port of Seattle website, Bid Results and Awards page for Third Runway - 2004-05 Embankment/S 154th St Construction) and Eglick Decl., Ex. I (*Daily Journal of Commerce* article dated March 6, 2004, entitled "$192.6M low bid on 3rd runway job"). Sea-Tac spokesman Bob Parker asserts in the article that, "We are scheduling work for this year we think we can do according to the current law."

2004. Ecology faxed a reply letter, received March 26, 2004,[9] indicating that a substantive response could take until April 9, 2004. Eglick Decl., Ex. K. Given the press of events, ACC counsel advised that such a hiatus was untenable:

> As the public disclosure documents reflect, the Port is looking to Ecology for go-ahead approval for fill activity. Further, as DOE's Ann Kenny indicated in writing, such activities "could begin in April." April is, of course, a couple of days away. In light of the apparent imminence of execution of a bid contract and site work, time is of the essence and it is not possible to wait until April 9 to receive a definitive response from Ecology. At the same time, ACC appreciates your assurances that you are proceeding in good faith. ACC, like you, would like to resolve this matter short of a motion practice before the Supreme Court.
>
> By the close of our conversation this morning, it appeared possible that you would be able to obtain the information necessary to respond to my March 19, 2004, letter sooner than April 9. To accommodate this and as a professional courtesy, we will look to hear from Ecology by Wednesday, March 31, 2004 (the last day before the commencement of April). A binding written assurance that construction will not commence and the status quo will not be altered until the Supreme Court has had an opportunity to issue a decision in the case will avoid the necessity to raise ACC's concerns with the Court.

Eglick Decl., ¶ 14 and Ex. L. As of the filing of this Motion on April 2, 2004, no further response had been received from counsel for Ecology. Eglick Decl., ¶ 14.

While Ecology's counsel has not responded substantively, an email dated June 10, 2003, from Ecology's Ann Kenny to other Ecology staff,

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[9] This Ecology letter was actually dated March 24, 2004. However, ACC only received it by fax after 5:00 p.m. on March 26 after an emailed inquiry to the Attorney General asking whether Ecology was going to respond.

obtained pursuant to the PDA, outlines Ecology's understanding of the Port's strategy:

> As I understand it, the Port will be working fast and furiously this summer [2003] and into the fall in order to prepare bid documents that will be released in December. **The Port (hoping to prevail on the legal issues before the Supreme Court) is hoping to be able to begin construction of the Third Runway in March or April [2004].** This means they want input from us this summer and fall as they revise the various elements of the CSMP [comprehensive stormwater management plan].

Eglick Decl., Ex. P at 1 (underlining in original; bolding added). This email and other documents reflect Ecology's actions on an expedited basis to accommodate the Port's schedule which calls for commencement of construction prior to a decision by this Court. *See* Ex. Q.

IV. Grounds for Relief and Argument

A. Legal Standard For Obtaining Relief Under RAP 8.3

ACC requests relief pursuant to RAP 8.3, which states that:

> Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. A party seeking the relief provided by this rule should us the motion procedure provided in Title 17.
>
> The purpose of this rule is to preserve the "fruits of the appeal."

Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wn.2d

734, 759, 958 P.2d 260 (Div. 1. 1998). As the Court has explained, the moving party is entitled to relief if it:

> can demonstrate that debatable issues are presented on appeal and that the stay is necessary to preserve the fruits of the appeal for the movant, after considering the equities of the situation.

Id. (citations omitted).

In applying RAP 8.3 our Courts apply a sliding scale and require a minimal showing on the merits where the harm to the movant is significant:

> In actual application of this theory, courts apply a sliding scale such that the greater the inequity, the less important the inquiry into the merits of the appeal. Indeed if the harm is so great that the fruits of a successful appeal would be totally destroyed pending its resolution, relief should be granted, unless the appeal is totally devoid of merit.

Boeing v. Sierracin Corporation, 43 Wn. App. 288, 291, 716 P.2d 956 (Div. 1 1986) (citations omitted).

B. The Appeals of the PCHB Decision Present Debatable Issues

Here, it cannot be disputed that debatable issues are presented in the appeals. In the typical case, relief is sought under RAP 8.3 to protect one party (the movant) should that party prevail. For example, in *Boeing v. Sierracin Corporation*, 43 Wn. App at 289-290, Sierracin sought relief under RAP 8.3 to stay enforcement of a superior court injunction prohibiting use of Boeing's data in Sierracin's production of airplane windows or in any application for product approval to the Federal

Aviation Administration. Division I explained that relief was appropriate under RAP 8.3 because, without such relief, Sierracin would "most probably be forced out of the cockpit window business during the pendency of the appeal." *Id.* at 292. Thus, the inquiry into the merits was viewed solely in light of Sierracin's issues on appeal.

Here, there are three appeals and many possible outcomes, a significant number of which would require the Port and Ecology to fundamentally alter their current plans. For example, ACC could prevail, in which case the project might not be able to proceed at all. Or, it might only be permitted to proceed if wetland fill and stream alteration are cut back or if in-basin mitigation for such actions is drastically increased. To preserve the fruits of this appeal, the status quo must be preserved. It is critical to prevent any action that would be inconsistent with this outcome because, as explained below, once the environmental damage is done to the area's aquatic resources, that damage is irreparable.

However, even if ACC does not prevail on its appeal, the decision of the PCHB could be affirmed (with the Port and Ecology appeals denied). Again, preservation of the status quo is necessary for the Court to be able to grant effective relief in this event, since the PCHB required more on-site mitigation than the Port was prepared to perform. Similarly, the Port and Ecology are moving to place fill materials on the site using the SPLP procedure rejected by the PCHB.

In many of these scenarios, it is in fact the Port that has the burden of overturning that the PCHB's findings regarding wetlands.

RCW 34.05.570(3)(e). Further, the Port and Ecology, in their appeals on the merits, have the burden of demonstrating that the PCHB's findings regarding SPLP are not supported by substantial evidence. RCW 34.05.570(3)(e). Thus, the issues are not only debatable, but are also in a posture in which the Port and/or Ecology must bear the burden.

Because the Port's imminent construction activities are not only inconsistent with a possible decision by this Court in favor of ACC, but would also be inconsistent with a ruling affirming the PCHB's order prohibiting use of the SPLP and requiring additional in-basin wetland mitigation, the merits of those claims (for which the Port and Ecology have the burden of proof) are implicated in the consideration of the merits of the appeals. Clearly, on these issues, in which the ACC has argued for affirmance of the PCHB (the Boards prohibition on use of the SPLP) or in the alternative for affirmance of the PCHB decision (required wetland mitigation) there are debatable issues on appeal for purposes of RAP 8.3

C. In the Absence of Relief, Irreparable Harm Would Occur, Destroying the Fruits of the ACC Appeal

In this case, the harm from allowing the Port to proceed with construction before resolution of the appeals would be overwhelming. The project is proximate to Des Moines, Walker, and Miller (a portion of which will actually be displaced by the project) Creeks, which are all "Class AA" waters. The applicable state water quality standards require

that, "Water quality of this class shall markedly and uniformly exceed the requirements for all or substantially all uses." WAC 173-201A-030(1)(a). As the PCHB noted in its decision:

> Des Moines, Miller and Walker Creeks also support a significant amount of public recreation, flowing through public parks in Des Moines and Normandy Park, before finally discharging to Puget Sound. Maintenance of recreational uses is a characteristic use of Class AA streams.
>
> Des Moines, Miller, and Walker Creeks are small streams and flow at very low levels during the summer months. The removal of even small quantities of water from these streams poses significant hazards to their aquatic health.

AR 000816 (PCHB Order at 43).

The fruits of ACC's appeal are the preservation of these valuable aquatic resources. Obliterating wetlands by placing even "clean" fill material into this watershed has an undeniable adverse effect upon it. If ACC's appeal is granted, or even if the Port and Ecology challenges are unsuccessful and the PCHB's decision is affirmed, it will be too late to preserve targeted wetlands and streams from destruction if the Port has already commenced filling them.

This Court has recognized that it is particularly appropriate to grant injunctive relief to prevent damage to the environment. *Kucera v. Department of Transportation,* 140 Wn.2d 200, 211 (2000) ("activities causing harm to the environment are frequently enjoined due to the irreparable nature of environmental injury"). As wetland scientist

Amanda Azous stated in a declaration to the PCHB in an earlier phase of this proceeding,[10] injunctive relief will "prevent the Port from taking irrevocable steps which would significantly degrade the aquatic resources of the Miller, Walker and Des Moines Creek watersheds." Azous Decl. at ¶¶ 4 (AR 008286). The harm is irreparable because once filled, wetland functions will be lost. *Id.* at ¶¶ 9, 10 (AR 008290). Even if removal of the fill was ordered, wetland functions would not return to pre-filling conditions for decades, if at all. The long-term loss of ecological function that would result from the filling of wetlands for the third runway is an irreparable harm and a significant injury.

Some of the first wetlands the Port proposes to fill are particularly important to the Miller Creek watershed:

> The wetlands the Port plans to fill in the initial phase are the most significant surface water sources to the remaining wetlands adjacent to Miller Creek. The majority of the 2.8 wetland acres to be filled in the short term are hydrologically connected to the creek. The loss of these wetlands would result in the permanent loss of nutrients and water to the Miller Creek wetland system

Azous Decl., ¶ 6 (AR 006790). Further, Ms. Azous notes that, once these wetlands are eliminated, "there will be little information available to fully restore them because no monitoring of their hydrologic contribution to the system has occurred." *Id.* at ¶ 8 (AR 006790).

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[10] The PCHB granted a stay of Ecology's September 2001 Certification in part based on acceptance of Ms. Azous' declaration.

Wetland expert Dyanne Sheldon[11] also emphatically states, in a declaration submitted in support of this motion, that:

> once these wetlands are destroyed it will not be possible to recreate or compensate for them fully in the next 50 years.

Declaration of Dyanne Sheldon in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Emergency Motion for Injunctive Relief Pursuant to RAP 8.3 ("Sheldon Decl."), ¶ 2.

According to Ms. Sheldon, research on wetlands has made clear the irrevocability of their elimination:

> The scientific literature makes it clear: eliminating a wetland is rather easy compared to attempting to create or restore one (National Academy of Sciences 2001). Removal of mature wetland forest, filling in wetland basins, and completely altering the contributing basins of these onsite wetlands will render it impossible to restore them to their former condition once they are eliminated. Grant of an injunction is necessary, therefore, to prevent the Port and/or Ecology from taking irrevocable steps that would significantly degrade the aquatic resources of the Miller, Walker and Des Moines Creek watersheds.

Sheldon Decl., ¶ 10.

Moreover, the adverse effects of filling wetlands extend well beyond the delineated boundaries of the wetlands:

> It is universally accepted that wetlands are among the most productive ecosystems on the planet. Water movement, on the surface and within shallow groundwater, is the principal route for the transport of water, organic matter and nutrients within a

[11] Ms. Sheldon is a wetlands expert with over 20 years of experience working for governmental agencies. Sheldon Decl., ¶¶ 3-7.

> watershed.[12] Eliminating the wetlands within that landscape irrevocably alters the basic food web within that basin. An emergent wetland typically will produce three or more times the organic carbon (the basis of the food web) than is produced by a similar area of upland shrub and forest land.[13] The condition of plants growing in water or saturated soil provides a steady supply of water and nutrients that have the potential to support high productivity. As a result, wetland communities have a profound influence on the food web, water flow conditions and habitat available in a watershed. This is particularly critical in the existing conditions on the west side of the existing airport runways, for the upland habitats have been all totally eliminated under thousands of cubic yards of fill material: the wetlands are the only remaining habitat zones in that upper basin.

Sheldon Decl., ¶ 11.

Ms. Sheldon also confirms Ms. Azous' comment that the absence of appropriate pre-construction data would hamper any effort to restore filled or disturbed wetlands:

> The Port's failure to establish baseline data for the wetlands it plans to eliminate will make it doubly impossible to return to the status quo if an injunction is not granted. Removing of the mature vegetation canopy, filling the wetland basins, and destroying the soil's ability to transport groundwater are all irreversible in a reasonable timeframe. The paucity and inadequacy of pre-disturbance data render a successful restoration virtually unattainable once fill activities have begun. If the Port is allowed to fill wetlands before a full review on the merits of its plans, there will be immediate and irreparable harm to these wetlands.

Sheldon Decl., ¶ 17.

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[12] Hillbricht-Ilkowska, Phosphorus and Nitrogen Retention in Ecotones of Lowland Temperate Lakes and Rivers, HYDROBIOLOGIA, 1993, Vol. 251, No. 1-3.
[13] Barnes and Mann, Fundamentals of Aquatic Ecosystems. Tables 4.1 and 11.1.

An injunction against construction activities, including the placement of fill materials, at the Third Runway site is absolutely essential in order to protect the Court's ability to provide effective relief when this case is decided. As Ms. Sheldon summarized:

> In short, filling and disturbance of wetlands will cause immediate and severe harm to aquatic resources of Miller, Des Moines, and Walker Creeks. It will be practically impossible to reverse this harm in any reasonable timeframe. The Port's mitigation plan will not replace the lost wetlands or functions. If the destruction of wetlands is allowed before this Court can rule on the merits of this case, irreparable harm to the watersheds will occur.

Sheldon Decl., ¶ 24.

The Court should conclude that the harm that would occur in the absence of injunctive relief is of such a nature as to destroy the fruits of the ACC appeal.

D. <u>The Equities Militate in Favor of Granting Relief</u>

The last factor used to determine whether the Court will grant relief pursuant to RAP 8.3 is a "consideration of the equities of the situation." *Boeing v. Sierracin*, 43 Wn. App. At 291. The gravity of the harm also influences the balancing of the equities:

> Environmental injury, by its nature, can seldom be remedied by money damages and is often permanent or at least of long lasting duration, i.e., irreparable. If such an injury is sufficiently likely, therefore, the balancing of harms will usually favor the issuance of an injunction to protect the environment.

Kucera v. Department of Transportation, 140 Wn.2d at 227 (Justice Johnson Concurring) (internal quotations and citations omitted).

Here, the balancing of the equities dictate the grant of relief. The Port already has stockpiled significant quantities of fill material on-site and is ready to begin embankment construction and filling of wetlands. Before the Court issues its opinion and a mandate terminating review, the Port will be able to destroy the streams and wetlands at issue in this case and will be able to truck in significant quantities of contaminated fill materials using the SPLP second-chance loophole. Some of the most important wetlands will be the first scheduled for destruction.

We expect the Port to claim that the "delay" in waiting for resolution of the case will cost it money. However, the Port would not be significantly delayed by waiting for a decision from this Court and a mandate terminating review, particularly since the case was argued over four months ago and a decision is likely imminent. When the significance and irreparable nature of the harm to the environment is balanced against claims of economic loss, the environment wins.

V. Conclusion

For all the reasons discussed above, ACC respectfully requests that the Court grant injunctive relief pending resolution of the pending appeals and issuance of a mandate terminating review. The Port and Ecology and their employees, agents, contractors and consultants should be enjoined from approving, permitting or taking any action at the Airport involving filling of wetlands, stream alterations, or commencement of any construction to facilitate or further such activities. This injunction is necessary to preserve the status quo and protect the fruits of the pending

appeal and is further necessary to provide effective relief even should all the appeals be denied and the decision of the PCHB affirmed.

RESPECTFULLY SUBMITTED this 2nd day of April, 2004.

HELSELL FETTERMAN LLP

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CERTIFICATE OF SERVICE

I, Andrea Grad, an employee of Helsell Fetterman LLP, attorneys for Petitioner Airport Communities Coalition, certify that:

I am now, and at all times herein mentioned was, a resident of the State of Washington, a citizen of the United States, and over the age of eighteen years.

On this 2nd day of April, 2004, I caused to be sent via legal messenger, for delivery by 4:30 p.m. today, a true and correct copy of the following documents in the above-captioned case to the parties listed below:

- Letter dated April 2, 2004, from Peter J. Eglick to the Court Commissioner and Clerk of Court;

- Respondent/Cross-Petitioner Airport Communities Coalition's Emergency Motion for Injunctive Relief Pursuant to RAP 8.3, with attached Certificate of Service;

- Declaration of Peter J. Eglick in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Emergency Motion for Injunctive Relief Pursuant to RAP 8.3, with Exhibits; and

- Declaration of Dyanne Sheldon in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Emergency Motion for Injunctive Relief Pursuant to RAP 8.3, with Exhibit,

To:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of April, 2004, at Seattle, Washington.

Andrea Grad