No. 04-35011

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AIRPORT COMMUNITIES COALITION,

Appellant,

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,

Respondents.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
Docket No. CV02-2483-MJP
The Honorable Barbara J. Rothstein / The Honorable Marsha J. Pechman

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BRIEF OF APPELLANT

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I. STATEMENT OF JURISDICTION

This case arises under the Clean Water Act ("CWA", 33 U.S.C. §§ 1251-1387). The District Court had jurisdiction over this matter pursuant to 28 U.S.C. §1331 (federal question). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1291 (final judgments). The District Court's Order Granting Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment was entered August 18, 2003, and the District Court's Order Denying Plaintiff Airport Community Coalition's Motion for Reconsideration was entered November 21, 2003. Appellant's Notice of Appeal was filed December 23, 2003, which is timely pursuant to FRAP 4(a)(1)(B) (appeal in civil case where United States is a party).

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. a. Did the Army Corps of Engineers ("Corps") act unlawfully in excluding from its Clean Water Act ("CWA") §404 permit decision conditions necessary for protection of water quality imposed pursuant to CWA §401 by a state quasi-judicial tribunal four months earlier?

b. In the alternative, did the District Court err in concluding that the Washington Department of Ecology's §401 certification rather than the PCHB's stay order was the operative certification decision in light of the District Court's construction of the one-year action provision set forth in CWA §401(a)(1)?

2. Was the Corps arbitrary and capricious in relaxing limits on wetland fill pollution and testing procedures adjudged necessary to prevent violations of state water quality standards by Washington's expert pollution control tribunal, the Pollution Control Hearings Board ("PCHB")?

3. Was the Corps arbitrary and capricious in issuing a CWA §404 permit based on a wetlands mitigation plan less protective than and inconsistent with that required by the PCHB?

4. Did the Corps act unlawfully and was it arbitrary and capricious in its public interest and alternatives analysis of the proposal to place 23 million cubic yards of fill in protected wetlands and streams where the Corps:

a. despite comprehensive expert rebuttal, deferentially accepted rather than independently analyzed project proponent forecasts and project need claims, arbitrarily dismissing alternatives;

b. refused to require from the applicant or independently analyze current project cost data?

5. Did the District Court err in accepting extra-record evidence offered by the Port of Seattle and excluding extra-record evidence offered by the Airport Communities Coalition?

III. STATEMENT OF THE CASE

This case concerns the approval by the Corps of an application by the Port of Seattle ("Port") to construct a third runway at Seattle-Tacoma International Airport ("Sea-Tac"). Because Sea-Tac does not have enough room for the project, the Port proposes to deposit 23 million cubic yards of fill in a 150-foot-deep canyon, over a mile long, to create space for a new runway. ER 2, 3.

Filling wetlands and streams requires, pursuant to the CWA, state certification of compliance with state water quality standards (CWA §401, 33 U.S.C. §1341) and a permit from the Corps pursuant to CWA §404 (33 U.S.C. §1344). The Corps granted the Port's §404 permit application on December 13, 2002. ER 4.

Appellant Airport Communities Coalition ("ACC"), composed of five local cities (Burien, Des Moines, Federal Way, Normandy Park, and Tukwila) as well as the Highline School District, appealed the Port's §404 permit in the U.S. District Court for the Western District of Washington. After briefing and oral argument on cross-motions for summary judgment, U.S. District Court Judge Barbara Rothstein granted judgment for the defendants on August 18, 2003. ACC sought reconsideration, which Judge Rothstein denied on November 21, 2003. This appeal followed.

IV. STATEMENT OF FACTS

A. Overview of the Third Runway Proposal

Fill is the key to the runway project, which would be constructed where there is now a wooded canyon laced with streams and wetlands. Moving west from the two existing runways, the ground elevation drops suddenly some 150 feet, sweeping toward Puget Sound, and forms the drainage basins for Des Moines, Miller, and Walker Creeks. ER 507.

These creeks are all classified by Washington as Class AA, the highest and most protective category for state waters. ER 507. All three are fish-bearing. ER 717-719.

Des Moines, Miller and Walker Creeks all flow through ACC member cities. ER 929A. Over 150,000 citizens of ACC cities, including the students of the Highline School District, use them for recreational and aesthetic purposes. *Id.* For example, Miller and Walker Creeks flow around and through the City of Normandy Park Community Center. *Id.* Des Moines Creek is an important feature of Des Moines' main waterfront park, and, after flowing through the park, it discharges into Puget Sound. *Id.* Over the years, school children and community groups have undertaken significant efforts to restore these fish-bearing streams to levels of purity in which aquatic biota may thrive. *Id.* at pp. 2-3. Many residents fish in the streams. *Id.* at p. 3. An aquifer used for drinking water also underlies

the project site. ER 978.

The project would fill all or portions of 50 wetlands, completely destroying 20 acres of wetlands. ER 94. It would also require filling and reconstruction of portions of Miller Creek and portions of drainage channels in the Miller and Des Moines Creek basins. ER 507. This work and the 23 million cubic yards of fill are necessary to create a platform for the new runway. Twenty-three million cubic yards is the equivalent of 46 football fields each stacked 300 feet high. ER 960.

The Port proposes an elaborate system of embankments and retaining structures to keep the fill in place. One element of this would be a mechanically stabilized earth ("MSE") wall and embankment over fifteen stories high. The MSE wall would come within 50 feet of Miller Creek. ER 508.

Some fill sources for the project have tested positive for elevated levels of heavy metals, petroleum products, and other contaminants. *See, e.g.,* ER 1025; ER 942-43; ER 949-951; ER 954-959; ER 962-965. Water running off and percolating through the embankment fill would discharge to streams and wetlands, principally Miller Creek, risking leaching of contaminants. ER 852-853; ER 735A-N.

B. State CWA §401 Certification Under the Clean Water Act

CWA §401 state certification is a mandatory prerequisite to obtaining a CWA §404 fill permit. 33 U.S.C. §1341(a)(1). States may certify a project only if "there is 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(a)(3)), and that any impacts to aquatic resources will be fully mitigated (RCW 90.54.020(3)(b)).

The Port first applied to the Washington Department of Ecology ("Ecology") for §401 certification in 1996. ER 884-892. Ecology certified the Project in July 1998 (ER 863-883), but the Port ultimately requested withdrawal of the certification when significant additional impacts to wetlands and aquatic resources were discovered that had not been disclosed in the Port's application. ER 861-862. The Port applied for §401 certification a second time in the autumn of 1999 (ER 826-830), but withdrew that application in September 2000 when Ecology informed the Port that certification would be denied. ER 850-851; ER 934-937.

Notice of the Port's third application was published on December 27, 2000. ER 833-848. An Amendment/Erratum to that notice was issued on January 17, 2001. ER 831-832. On August 10, 2001, Ecology issued a certification for the project. ER 745-786. The Port appealed that certification as too stringent. Ecology quickly agreed in private negotiations with the Port to withdraw it. Ecology then issued a less stringent certification on September 21, 2001. ER 952-953; ER 920-926; ER 30-76.

ACC appealed the September §401 certification to the state Pollution

Control Hearings Board ("PCHB" or "Board"), and filed a motion asking the PCHB to stay it. ER 927-928. The PCHB is a three-member quasi-judicial tribunal composed of "members qualified by experience or training in pertinent matters pertaining to the environment ..." RCW 43.21B.020. The Washington Legislature created the PCHB specifically to ensure expert review of complex environmental decisions. *See, e.g., Dioxin/Organochlorine Center v. Department of Ecology*, 119 Wn.2d 761, 775-76, 837 P.2d 1007 (1992); RCW 43.21B.020.

On December 17, 2001, after a hearing and review of the parties' extensive submissions, the Board granted ACC's stay motion. ER 659-680. Preparation for trial continued, including various motions and scores of expert depositions and discovery requests.

The PCHB then held a trial on the merits of ACC's appeal from March 18 through 29, 2002. The Board heard testimony (including cross-examination) from 38 expert witnesses on highly technical subjects, and examined many themselves. On August 12, 2002, after completing review of the 50,000-plus-page record, the PCHB issued its 139-page Final Findings of Fact, Conclusions of Law and Order ("PCHB Decision" or "PCHB Order"). It held that Ecology's §401 certification failed in several respects to provide the required reasonable assurance that the project would comply with requirements for protection of aquatic resources. *See, e.g.*, PCHB Decision at pp. 31 (ER 526), 112-14 (ER 607-609), 123 (ER 618), 125

(ER 620), 127-29 (ER 622-624).

The PCHB therefore imposed sixteen conditions it held necessary for the certification to meet the anti-degradation mandate of Washington's water quality laws. *Id.* at pp. 135-38 (ER 630-633). For example, the conditions rejected the Port's proposal to "mitigate" for destruction of some wetlands by providing "enhanced" buffers for others, instead of actually replacing wetlands destroyed; corrected the ratio applied to calculate mitigation for destroyed wetlands; required effective performance standards for wetlands mitigation; augmented low-flow mitigation requirements for Des Moines Creek; and tightened Ecology's lax limits on toxic contaminants in fill (as well as the requirements for testing to identify such pollutants) to ensure that the Port would not continue to import polluted fill for deposit at the site. *Id.* The PCHB concluded:

> Based on the Findings of Fact and Conclusions of Law outlined above, the Board concludes, with the further conditions imposed by the Board, there is reasonable assurance the construction of the Port's proposed improvements at the Airport will comply with state water quality standards. Accordingly, the Board affirms Ecology's §401 certification for the Port's projects as modified by the conditions established by the Board in this Order.

Id. at 138 (ER 633) (emphasis added).

The Port immediately appealed the PCHB decision in Washington's King County Superior Court, challenging the most protective conditions. Superior court appeals were later filed by ACC (arguing that the PCHB should have done more to protect against degradation), and by Ecology. Those state court appeals have since

been briefed and argued (on November 18, 2003) in the Washington Supreme Court, and are awaiting decision.

C. The Corps §404 Permit.

Concurrent with its application for state §401 certification, the Port applied to the Corps for a CWA §404 permit on December 27, 2000. ER 833-848. The Corps did not issue a decision on the Port's application until December 13, 2002 (ER 4, 11), four months after the PCHB issued its Final Order on the state 401 certification.

The Corps permit intentionally excludes at least nine of the 16 conditions for protection of aquatic resources imposed by the PCHB. ER 6. Among those excluded are key conditions regarding wetlands mitigation and protections against deposit of inexpensive but polluted fill. The Corps Record of Decision ("ROD") also rejected ACC's contentions that the project did not provide commensurate mitigation for its obliteration of aquatic resources, and did not pass muster under the Corps' public interest and alternatives analysis requirements. ER 98, 99, 197.

V. SUMMARY OF THE ARGUMENT

The Corps §404 permit violated the Clean Water Act in failing to incorporate all of the CWA §401 state certification conditions imposed by the Washington Pollution Control Hearings Board to protect against degradation of state aquatic resources. The Corps' claim that such exclusion was justified because

the PCHB conditions were not imposed within one year of the date of application for the §404 permit is an erroneous construction of CWA §401.

No deference is due to the Corps construction because CWA §401 is not committed to the Corps' administration. Both the EPA and FERC, federal agencies which also implement CWA §401, take different approaches which would have resulted in a different outcome from the Corps'.

The Corps' reliance on the fact that the PCHB is a quasi-judicial tribunal rather than a "court" to justify its indifference is misplaced. The PCHB was established by the Washington Legislature for the explicit purpose of providing a quasi-judicial tribunal with specific environmental expertise to adjudicate §401 and other environmental orders.

The District Court erred in accepting the Corps' refusal to credit the PCHB conditions and instead relying on the earlier Ecology §401 certification which the PCHB had ordered modified. Further, once the District Court determined to adopt the Corps' claim that only state §401 orders issued within one year of application will be recognized, the PCHB stay order, which set aside Ecology's certification explicitly to prevent issuance of a §404 permit by the Corps pending review on the merits by the PCHB, should have been recognized as preventing issuance of a §404 permit pursuant to CWA §401(a)(1).

Even assuming the Corps was not bound under CWA §401 to automatically incorporate the PCHB conditions, the Corps' exclusion of them was arbitrary and capricious in light of their purpose and the record supporting their adoption. The Corps' rationale for exclusion of the PCHB conditions with respect to polluted fill and wetlands represent clear errors in judgment.

The District Court erred in admitting extra-record evidence from the Port in support of its claims that the PCHB conditions restricting contaminated fill were unwarranted. The District Court further erred in at the same time excluding extra-record evidence offered by ACC in support of its challenge to the Corps' public interest analysis.

The Corps violated its own regulations and guidelines in its public interest analysis. It uncritically accepted project proponent claims concerning airport demand and delays, citing the FAA's federal role in that regard. However, CWA §404 requires an independent analysis regardless of whether a project advocate is a federal agency, particularly here, where substantial and expert analysis was provided to the Corps demonstrating that project proponent justifications were not borne out in the record. The Corps further violated its own regulations and was arbitrary and capricious in its failure to require accurate, current cost data from the project proponent. The Corps could not have, in the absence of such data, properly

evaluated whether the project was in the public interest and whether there were practicable alternatives to it.

VI. ARGUMENT

A. Standard of Review

The Court of Appeals reviews *de novo* a district court decision to grant summary judgment. *Wilderness Society v. United States Fish & Wildlife Service,* 353 F.3d 1051, 1059 (9th Cir. 2003). This Court's review of the Corps decision is guided by §706 of the Administrative Procedure Act ("APA"), under which the Court "must set aside the Corps's actions, findings, or conclusions if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ocean Advocates v. United States Army Corps of Engineers,* 361 F.3d 1108, 1118 (9th Cir. 2004) (quoting 5 U.S.C. §706(2)(A)). A district court's review is accorded "no particular deference, because the district court, limited to the administrative record, is in no better position to review the [agency's] action than is the Court of Appeals." *Stop H-3 Association v. Dole,* 740 F.2d 1442, 1450 (9th Cir. 1984). The Court of Appeals reviews a decision of an administrative agency de novo and "views the case from the same position as the district court." *Turtle Island Restoration Network v. National Marine Fisheries Service*, 340 F.3d 969, 973 (9th Cir. 2003).

The court subjects the final agency action to a "thorough, probing, in-depth

review," *Seattle Audubon Soc'y. v. Moseley,* 798 F. Supp. 1473, 1476 (W.D. Wash. 1992) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 415 (1971), to ensure the Corp's decision "was based on a consideration of the relevant factors" and to determine "whether there has been a clear error in judgment." *Ocean Advocates*, 361 F.3d at 1118; *Northwest Environmental Defense Center v. Bonneville Power Administration,* 117 F.3d 1520, 1536 (9th Cir. 1997).

An administrative agency's interpretation of federal law is given no deference where it is contrary to the clear congressional intent, and questions of congressional intent are "still firmly within the province of the courts under *Chevron*." *Wilderness Society v. United States Fish & Wildlife Services*, 353 F.3d 1051, 1059 (9th Cir. 2003) (quoting *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1164 (9th Cir. 1999)).

If congressional intent is not clear, the agency's interpretation is only entitled to deference when it appears that, "Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* (emphasis in original) (citing *United States v. Mead Corp.*, 533 U.S. 218, 226-227, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001)). In all other circumstances, the Court will give the agency's view "respect" depending upon "the thoroughness evident in its consideration, the validity of its reasoning, its

consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 1060 (citing *Mead*, 533 U.S. at 228, 121 S.Ct. 2164).

B. The Corps' Refusal to Incorporate All of the PCHB's §401 Conditions into the §404 Permit Was Unlawful.

1. The Corps Must Incorporate All §401 Certification Conditions

CWA §401 certifications are non-discretionary prerequisites to issuance by the Corps of §404 permits for destruction of wetlands and streams in state waters. 33 U.S.C. §1341(a)(1). "No license or permit shall be granted if certification has been denied by the State, interstate agency, or the administrator, as the case may be." *Id.*

CWA §401(d) mandates that state certification requirements "shall become a condition of any federal license or permit subject to the provisions of this section." 33 U.S.C. §1341(d) (emphasis added). States may certify federally permitted projects only if "there is 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(a)(3), and, in Washington, only if all impacts to aquatic resources are fully mitigated. RCW 90.54.020(3)(b). While a state may waive certification authority with respect to federally-permitted projects, Washington's prosecution of its §401 certification authority with respect to the Third Runway Project has been multi-

faceted and aggressive. The Corps' unlawful failure to credit the PCHB's §401 certification order is at the heart of this appeal.

a. Chronology.

Although it must accept all §401 conditions imposed by the state, the Corps, guided by the applicant Port (ER 476-477), systematically weeded out the PCHB conditions providing the most substantive protection for aquatic resources, including wetlands mitigation, mitigation for reduction in Des Moines Creek flows caused by the Port's project, safeguards against use of polluted fill, and critical monitoring requirements.

A chronology of key dates is essential to review of the Corps action:

- January 17, 2001: Notice is published of the Port's third "joint application" for a §401 certification and a §404 permit. ER 831-832.
- August 10, 2001: Ecology issues a §401 certification for the project. ER 745-786. The Port appeals that certification as too stringent. Ecology agrees in private negotiations with the Port to a weakened version, issued September 21, 2001. ER 952-953; ER 920-921; ER 35-76.
- October 1, 2001: ACC appeals the §401 certification to the Washington Pollution Control Hearings Board ("PCHB"). ER 915.
- December 17, 2001: PCHB stays the Ecology §401 Certification (ER 659-680), explicitly to preserve the state's jurisdiction under §401:

> The Board will avoid its proceedings becoming suspect for the potential *fait accompli* that may occur in such situations.... [T]he potential issuance of the §404 permit during the pendency of this appeal warrants the Board's determination that failure to stay the effectiveness of the §401 certification could cause irreparable harm to the wetlands proposed for filling.

677-678.

- December 31, 2001: Port files an interlocutory appeal to superior court to overturn the PCHB stay. ER 906-914. It fails. ER 893-896.
- March 18-29, 2002: Following discovery, including dozens of depositions, the PCHB holds a two-week trial on ACC's appeal, takes testimony from 38 expert witnesses and examines a 50,000-plus page record.[1]
- August 12, 2002: PCHB issues a 139-page Final Findings of Fact, Conclusions of Law and Order. ER 496-634. The Order confirms that, as written, Ecology's §401 certification failed to provide reasonable assurance that the project would comply with state water quality requirements for protection of aquatic resources.[2] The Board imposes sixteen conditions necessary to assure compliance with water quality standards. The Corps receives the PCHB decision immediately, meeting with the Port to review it three days after issuance. ER 635.

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[1] The entire PCHB record, including the PCHB's final Order, is contained within the Corps Administrative Record, which was filed with the District Court on January 13, 2003 (Docket No. 14).

[2] *See, e.g.*, PCHB Decision at pp. 31 (ER 526), 112-14 (ER 607-609), 123 (ER 618), 125 (ER 620), 127-29 (ER 622-624).

- December 13, 2002: Corps issues the §404 Record of Decision ("ROD") and permit, four months after issuance of the PCHB Final Order. ER 4-76 (permit), ER 77-435 (ROD). Corps excludes nine of the sixteen conditions which the PCHB held were necessary to prevent violation of state water quality standards.

b. The state did not waive its certification authority.

The Corps' excuse for exclusion of the PCHB conditions was that the PCHB's final order was issued more than one year after the Port applied for §401 certification. The Corps contended this was a "waiver." ER 90.

The Corps' decision is inconsistent with a common-sense reading of the statute and regulatory definitions of waiver. Per the statute, "[i]f the State... fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived." 33 U.S.C. §1341(a)(1). There was no such failure here: the state diligently pursued review, even in the face of Port foot-dragging.

In fact, Washington had invested years reviewing zigs and zags in the Port proposal which, as described above, the Port had twice previously withdrawn. The state's review of the Port's third application began immediately upon receipt. The

state continued to act, issuing a certification within one year.[3] The PCHB itself commenced review of that certification within one year. The PCHB's stay order setting aside Ecology's grant of the certification was also issued within one year. ER 659, 680. In light of this history of diligent action in the face of successive stop-and-start Port submissions, the Corps' exclusion of the PCHB's 401 Certification conditions is particularly incongruous.

The dictionary defines 'waiver' as "the act of waiving or intentionally relinquishing or abandoning a known right, claim or privilege." Webster's Third New International Dictionary (1993); *In re George,* 177 F.3d 885, 889 (C.A. 9 1999). This is consistent with EPA regulations, which define waiver as written notification by the state permitting agency, or notification by the federal permitting agency to EPA that a state has failed to act following request for action by the federal agency. 40 C.F.R. §121.16.

The legislative history of §401(a)(1) supports this interpretation. The conference report accompanying §21(b) of the Water and Environmental Quality Improvement Act of 1970, which has become §401(a)(1), explained: "In order to insure that sheer inactivity by the State... will not frustrate the Federal application, a requirement... is contained in the conference substitute that if within a reasonable

[3] ER 35-76. The record is replete with evidence of the state's diligence. *See, e.g.*, examples of Ecology-Corps §401 Permit Decision-Making meeting notes (ER 972-975; ER 966-971; ER 933A-933C.

time, which cannot exceed one year, after it has received a request to certify, the State... fails or refuses to act on the request for certification, then the certification requirement is waived." 1970 U.S.C.C.A.N. 2712, 2741 (emphasis added). *See North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir. 1997) (a state waives certification "only by refusing to respond to the request [for certification] within a reasonable period of time").

The Corps' interpretation of "waiver" upsets this traditional allocation of state and federal powers, which the CWA §401 certification process carried forward, in which the states retain plenary or veto authority over federally-permitted projects that threaten state waters. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) (*citing* 2 W. Rodgers, Jr. Environmental Law: Air and Water, §4.2, at 26 (1986)). The Corps' action in this matter thus alters the traditional federal-state framework envisioned by the Clean Water Act. *See Solid Waste Agency of No. Cook County v. Corps of Engineers*, 531 U.S. 159, 173, 121 S.Ct. 675, 683, 148 L.Ed.2d 576 (2001) ("SWANNC").

Here, Washington affirmatively asserted jurisdiction, promptly acting to process the Port's latest application in good faith. Particularly in light of the legislative history, which keys on Congress' concern for avoidance of 'sheer inactivity,' it cannot be said that Washington's record of diligent review of the Port's extraordinarily complex applications constitutes a waiver.

c. The review standard is *de novo* and the Corps is entitled to no deference.

The Court reviews *de novo* legal questions involving interpretation of CWA §401. The Court does not defer to interpretations of §401 by agencies that are not charged with administering the statute. *Alabama Rivers Alliance v. FERC,* 325 F.3d 290, 296-97 and n.9 (D.C. Cir. 2003); *California Trout, Inc. v. FERC,* 313 F.3d 1131, 1133-34 (9th Cir.2002); *American Rivers v. FERC,* 129 F.3d 99, 107 (2nd Cir. 1997).

The Corps is due no deference in its interpretation of CWA §401. The Corps is not invested with special responsibility for §401, which applies to all federal agencies engaged in activities affecting state waters, including for example the Federal Energy Regulatory Commission ("FERC"), the Bureau of Reclamation, and the Department of Transportation. *See Keating v. FERC, supra,* 927 F.2d at 619 (§401 certification requirement equally applicable to FERC licenses and Corps §404 permits). The Clean Water Act provides that, "[e]xcept as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency... shall administer this chapter." 33 U.S.C. §1251(d). In fact, it is EPA, not the Corps, which has issued regulations applicable to all federal agencies regarding state certifications. *See* 40 C.F.R. Part 121. Given EPA's role, and absent express authority under the statute itself for CWA §401, Corps interpretations of it merit no deference. *Alabama Rivers, supra*, 325 F.3d at 297;

Cal. Trout, supra, 313 F.3d at 1133-34 (9th Cir. 2002); *American. Rivers, supra,* 129 F.3d at 107; *City of Olmsted Falls v. FAA,* 292 F.3d 261, 270 (D.C. Cir. 2002) ("[W]hen we are faced with an agency's interpretation of a statute *not* committed to its administration, we give no deference.") (emphasis in original); *see also Johnson v. SEC,* 87 F.3d 484, 486 (C.A.D.C. 1996) (courts interpret *de novo* statutes of general applicability).

The Corps' failure to credit the PCHB stay order conflicts with interpretations by other federal agencies, particularly EPA and FERC. For example, EPA rules governing §401 certifications for stormwater discharge permits require EPA to give states notice before a waiver can be declared: (1) if a certification has not been received before EPA issues a draft stormwater discharge permit, 40 C.F.R. §124.53(c); and (2) when a state appellate court or board suspends the effectiveness of the state certification. 40 C.F.R. §122.44(d)(3). Further, per EPA regulations, if a modified certification (such as that issued here by the PCHB) is received before final EPA action, the federal permit must be consistent with the state's more stringent conditions. 40 C.F.R. 124.55(b). In contrast to EPA, the Corps simply cut the state off even though the Corps waited until four months after the PCHB Order to issue a §404 decision.

The Corps action here also conflicts with FERC's policy on §401 stays issued by Washington's PCHB. In a proceeding involving §401 certification for

FERC re-licensing of a hydroelectric project on Washington's Cowlitz River, FERC stayed its re-licensing proceedings because the PCHB had issued a stay of the §401 certification for the same project. 99 FERC ¶61,067, 2002 WL 32002995 (F.E.R.C.) (*City of Tacoma, Washington, Project No. 2016-055*, Order Issuing Stay of New License (4/12/02)). FERC then incorporated revised certification conditions ordered by the PCHB. 104 FERC ¶61,092, 2003 WL 21691760 (F.E.R.C.) (*City of Tacoma*, Order Denying Rehearing and Lifting Stay at 2-5 (¶¶10-18) (July 18, 2003)). Clearly, had FERC (a federal agency equally conversant in §401 certifications as the Corps) been presented with the PCHB orders in this case, it would have credited them, and found no waiver.

The Corps' interpretation of §401(a)(1) is draconian, particularly in comparison to those of other federal agencies with equivalent responsibility for its implementation. Deference is not appropriate where such a conflict among agencies exists. *Scales v. INS,* 232 F.3d 1159, 1165 (9th Cir. 2000); *Proffitt v. FDIC,* 200 F.3d 855, 860 (D.C. Cir. 2000).

Finally, Corps reliance on its own 1987 Regulatory Guidance Letter ("RGL") to support its waiver interpretation is misplaced. ER 90 (ROD at 8). RGL 87-03 actually acknowledges, as does FERC, that a state judicial set-aside of a §401 certification prevents federal agency approval:

> ...[I]f a state issues a 401 water quality certification, and a state or Federal court voids or sets aside that certification before the Corps

> issues the permit and within the statutory 1-year period from the date of application, then the Corps cannot issue the permit unless and until the 401 certification is legally revived.

ER 743-744.

The Corps, however, gave no credence to the PCHB stay order, contending that the PCHB is "not a court." ER 90 (ROD at 8). Odder still, the Corps claimed that, even if the PCHB stay issued within one year was cognizable, the Corps was still not required to credit the PCHB decision which only revived the §401 Certification with conditions. *Id.* This approach resulted in a circumstance in which the Corps withheld action on the §404 permit for months after the PCHB decision, but still refused to credit its requirements for reviving the §401 Certification.

Contrary to the Corps' contention, the PCHB must be recognized as a review tribunal for §401 certifications. It is a quasi-judicial body established by the Washington Legislature to provide *de novo* review of appeals of §401 certifications and other environmental orders. RCW 43.21B.110(b); RCW 43.21B.310. The PCHB is explicitly vested with specialized expertise to "provide for a more expeditious and efficient disposition of appeals with respect to the decisions and orders of the department [of Ecology]..." RCW 43.21B.010.

In Washington "higher" state judicial bodies have no authority to conduct trials on the validity of a §401 certification or to issue orders with respect to them

except on an appeal from a trial and decision by the PCHB. RCW 43.21B.320(5). Construction of state law by a quasi-judicial body of special competence, like the PCHB, is accorded substantial weight under Washington law. *Buechel v. State Dept. of Ecology*, 125 Wn.2d 196, 202-03 (1994); *Jaramillo v. Morris*, 50 Wn. App. 822, 831-32 (1988).

Washington is not the only state that chooses to utilize a quasi-judicial hearings board to review appeals of state certification decisions. *See, e.g.,* Colo. Rev. Stat. § 25-8-202(1)(k); 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 Code Ch. 1021; *Alabama Rivers, supra*, 325 F.3d at 293, n.2 (describing Alabama's §401 quasi-judicial appeal process). States have authority to establish their own procedures for processing §401 applications. *City of Fredericksburg v. FERC,* 876 F.2d 1109, 1111-12 (4th Cir. 1989); *see also U.S. v. Marathon Dev. Corp.,* 867 F.2d 96, 102 (1st Cir. 1989) (review of certification decisions vested exclusively in state agencies and courts). The Corps' refusal to recognize the PCHB adjudication because the PCHB is not a "court" invades the state's province. *See SWANCC, supra.*

The Corps' confused and illogical interpretation of its own RGL is entitled to no deference by this Court.

d. The Corps' refusal to credit the PCHB decision was unlawful.

i. §401(d) required the Corps to incorporate all state conditions.

Pursuant to CWA §401(d), the Corps must incorporate all conditions imposed in the §401 certification. 33 U.S.C. §1341(d); *American Rivers v. FERC, supra*, 129 F.3d at 107; *U.S. Dep't of the Interior v. FERC*, 952 F.2d 538, 548 (D.C. Cir. 1992); *Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

The most straightforward interpretation of the statute, harmonizing the provisions of §401(a)(1) and §401(d), is that, once a state undertakes diligent review, it cannot be said to have refused or failed to act within one year. This Court should hold here that, once the state acted to assert and retain its jurisdiction under CWA §401, the Corps was obligated pursuant to CWA §401(d) to credit any state certification orders until, if, and when the Corps had concluded its decision making process and finally issued a §404 permit. This interpretation is consistent both with the terms of §401, and with federal decisions reviewing the nature of state certification authority. For example, in *American Rivers v. FERC, supra,* state §401 conditions imposed more than one year after the application was filed were held binding on FERC. 129 F.2d at 103-04; *see Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("disputes over [certification] matters, *at least so long as*

they precede the issuance of any federal license or permit, are properly left to the states themselves." (emphasis in original)); 40 C.F.R. §124.55(b).

ii. The Corps' interpretation of the one-year requirement should have resulted in denial of the §404 permit.

If this Court agrees with the District Court that any action by the state after January 17, 2002,[4] need not be credited, then the Corps §404 permit in this matter must be vacated. As of December 17, 2001, the Ecology §401 Certification had been 'set aside' (in the words of the Corps' own RGL) by the PCHB stay. The Port implicitly acknowledged this at the time by immediately and unsuccessfully seeking interlocutory reversal of the PCHB stay order in superior court.[5] If, as the Corps suggests in its ROD, and as the District Court held (ER 1077), federal agencies may only act on the state §401 order in existence at the one-year deadline, then in this case the order extant at one year was effectively a denial: an order issued by a tribunal with jurisdiction setting aside Ecology's certification that state water quality standards were met. The District Court's failure to recognize this implicit result of its decision and its refusal to reconsider on this point (ER 1109) (when requested by ACC) were error. Certification denial requires §404 denial. CWA §401(a)(1); 33 U.S.C. §1341(a)(1).

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[4] This is the one-year deadline based on the Corps' Revised Public Notice for the project dated January 17, 2001. ER 831-832.

[5] *See* ER 691-694, ER 684-690 (ACC letters to Corps dated 12/21/01 and 12/28/01, urging Corps to recognize PCHB Stay Order).

This outcome, harsh for the Port, is required by the Corps' refusal to credit the ultimate PCHB decision. If the subsequent PCHB decision on the merits were credited, the Port could obtain a §404 permit, subject of course to the conditions crafted by the PCHB to assure compliance with Washington's water quality laws. However, if the Corps' interpretation of the one-year provision stands, then the outcome of this appeal must be vacation of the §404 permit rather than simple incorporation of the PCHB conditions.

2. The Corps Erred in Excluding PCHB Conditions 7 and 8, Which Protect Against Use of Polluted Fill.

Because potential contaminants in the Port's 23 million cubic yards of fill would pose a significant threat to surrounding streams and wetlands, the PCHB imposed straightforward conditions (Nos. 7 and 8) to protect against them. These were among the protections the Corps excluded from the §404 Permit.

In addition to its general review standard, the Corps' 404(b)(1) Guidelines prohibit any discharge that "causes or contributes, after consideration of disposal, site dilution and dispersion, to violations of any applicable State water quality standard." 40 C.F.R. §230.10(b)(1) (emphasis added). The Corps was required to "determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical and biological components of the aquatic environment." 40 C.F.R. §230.11. With respect to contaminants the Corps was to "determine the degree to which the material

proposed for discharge will introduce, relocate or increase contaminants." 40 C.F.R. §230.11(d).

Particularly in light of its own Guidelines, the Corps' exclusion of the PCHB conditions was arbitrary, capricious, an abuse of discretion and a "clear error in judgment," even apart from the requirements of CWA §401. *Northwest Environmental Defense Center v. Bonneville Power Administration,* 117 F.3d 1520, 1536 (9th Cir. 1997).

The PCHB's protections are particularly important in light of the Port's construction plans. The runway fill embankment would be constructed upon a rock drainfield three feet thick, the "drainage layer." That layer is designed to collect groundwater from throughout the embankment and transport it under the massive retaining walls to wetlands and streams below. This conveyance is essential to prevent water starvation of the (remaining) wetlands and streams. However, depending on the quality of the fill through which it passes, the groundwater could pollute the resources below the retaining walls (ER 933A) because the conveyance "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 wetlands and streams. ER 656. As the PCHB concluded, "It is undisputed that absent appropriate

conditions there is a risk that contaminants in the fill could cause violations of groundwater or surface water standards." PCHB Decision at 125 (ER 620).

Ecology's August 2001 §401 Certification acknowledged this risk and imposed fill source screening procedures and limits on pollution expressed in terms of milligrams of contaminants allowed per kilogram of soil or "mg/kg." ER 760-765. It also included a particular requirement for a six foot "sandwich" of even cleaner fill covering the top and bottom of the embankment. ER 763. The August Certification was appealed by the Port as too stringent. ER 920. Ecology then withdrew it and replaced it with one negotiated with the Port.

The new September 2001 Ecology Certification substituted an alternative, allowing the Port to just place a wedge of "cleaner" fill only at the base of the embankment. ER 49. The substitute also allowed the Port a way around rejection of fill that failed to meet the numeric limits on pollution. That way was the Port's Synthetic Precipitation Leaching Procedure ("SPLP") Workplan. ER 73-76. As the PCHB explained, the SPLP is a procedure whereby "fill material is placed in a column, and liquid comparable to acid rain is passed through it." ER 559. According to the Port's proposed Workplan, "the results from the SPLP are then compared to freshwater ambient water quality criteria in WAC 173-201A-040". ER 560.

It was with this background that the PCHB, after a lengthy trial and review of the voluminous record, imposed conditions necessary to provide reasonable assurance that water quality standards would not be violated. ER 631-632 (PCHB Order at 136-37)]. It was these protective conditions which the Corps excluded without benefit of trial or cross-examination of the experts on the evidence.

a. The Corps erred in allowing use of the SPLP "Workplan"

This Court has recognized the environmental damage that can result from even so called "naturally occurring" toxic metals: "naturally occurring metals in treated wastewater cause environmental damage." *Rybacheck v. United States EPA,* 904 F.2d 1276, 1292 (9th Cir. 1990) (citations omitted).

PCHB Condition 8 explicitly barred use of the Port's SPLP Workplan which facilitated placement of fill which was otherwise too polluted with such toxic materials. The PCHB articulated several reasons for rejecting the Workplan:

> [It] 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.
> * * *
>
> 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.

ER 560-561 (PCHB Order at 65-66).

The PCHB emphasized as well the lack of a statistically meaningful test protocol for the Port's SPLP Workplan as a third reason for banning its use: "only one SPLP sample is required to be collected for each original screening sample that exceeds the screening criteria." *Id.*

The Port SPLP Workplan's failure to address all applicable water quality standards (a key consideration for CWA §401 certification) and its lack of a statistically meaningful sampling regime for assurance that fill would not be contaminated demonstrated the inappropriateness of its use for the runway project, regardless of the SPLP test's theoretical validity in other circumstances.

Finally, the Port's own records and evidence presented to the PCHB demonstrated that the Port's SPLP Workplan was incapable of routinely detecting contaminants of concern at the limits established in the applicable state water quality standards, 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.

Id. at 65-66. 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. ER 941.

It is arbitrary and capricious -- a clear error in judgment -- to rely on a test that can only detect contaminants at a level of 50 micrograms per liter ("ug/l") where, for example, the applicable state limit for copper is 5.3 ug/l, 16 ug/l for lead, and 33.7 ug/l for zinc. ER 931.

The PCHB finding rejecting the Port's SPLP Workplan was compelled in part by evidence in its record of a Port consultant report utilizing SPLP which had approved importation of contaminated fill material. ER 944-948. The PCHB record also contains a spreadsheet of SPLP test results (ER 985) by a Port consultant showing that, in at least 15 of them, the SPLP test reporting limit (the lowest level at which the test could detect one or more toxic pollutants) was higher than the maximum set for that pollutant's presence.

The Corps summarily determined that the PCHB condition rejecting the Port's SPLP Workplan "does not need to be added to the [§404] permit." ROD at 27 (ER 109). It did so at the Port's urging (ER 476-477), and with scant analysis. For example, the Corps reiterated the Port claims that SPLP "is a scientifically recognized valid test" (ER 109), citing state regulations (WAC 173-340-747(2)(a) and (7)(b)), federal regulations (40 C.F.R. Part 261 Appendix II), and EPA publication SW-846. ER 106.

However, the federal regulation cited does not list the SPLP test, but instead lists a different leaching test, the Toxicity Characteristic Leaching Procedure

(TCLP, Method 1311). SPLP is listed in the menu of testing methods in EPA Publication SW-846, but so are hundreds of other testing procedures. As the PCHB learned at trial, simply because a test is included in a general list does not establish its validity for any application. SPLP itself is merely a protocol for producing leachate; it contains no guidance on how to test fill for compliance with Washington water quality standards. That determination requires an exercise of critical judgment, in which the PCHB engaged, but which the Corps excluded.

The Corps' rote approach is also evident in its allusion (ER 27) to the EPA's use of SPLP in the "Bunker Hill cleanup project." There is no evidence in the Corps record explaining the facts and circumstances under which EPA used the test there (e.g. sampling protocol, contaminants tested, required testing limits) so the bare assertion is of no value here. Further, the third runway is not a clean-up project. The streams at issue have the state's highest rating for water quality, Class AA. A test well-suited to "cleaning up" to some unspecified level a polluted mining site can be of little value, depending on how it is actually used, in protecting unpolluted sites from degradation.

The Corp's reliance on a Washington regulation (WAC 173-340-747(7)(d)) governing cleanup of already-contaminated sites is similarly misplaced. That regulation allows use of SPLP, but includes significant exceptions and caveats which the Corps overlooked. For example, the regulation contemplates possible

use of SPLP for only nine metals: arsenic, cadmium, chromium, copper, lead, mercury, nickel, selenium and zinc. It excludes five metals (antimony, barium, beryllium, silver and thallium) which are listed in the §401 certification fill contaminant limits. The state regulation only allows leaching tests for contaminants not specifically listed if the user can "demonstrate with site-specific field or laboratory data or other empirical data that the leaching test can accurately predict groundwater impacts." WAC 173-340-747(7)(d). As the PCHB held, the Port failed to do so.

b. The Corps erred in rejecting the PCHB's limits on fill contaminants.

Washington's State Water Quality Standards for Toxic Substances mandate that:

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

WAC 173-201A-040(1) (emphasis added).

Relying on Ecology's own toxics experts, the PCHB determined that Ecology's §401 Certification allowed fill pollutants at levels which would not meet this anti-degradation standard. PCHB Decision at 136-137 (ER 631-632). The PCHB therefore set lower limits on contaminants in fill. ER 631-632 (PCHB Order at 136-137, Condition 7). The Corps rejected these lower limits, reverting to

Ecology's more lenient fill criteria which the PCHB had rejected. ER 174 (ROD at 92). It is notable that earlier the Corps had (while the Port's application was pending) delivered 60,000 cubic yards of dredged materials from the Corps' own Hamm Creek project, known to be contaminated with toxic PCBs and DDTs, to the Runway site. ER 942-943. Corps documents indicate that the Corps did so because depositing the contaminated material as fill at the runway site would "save [the Corps] a ton of $" in disposal costs. ER 854-855.

The Corps ROD states that, "in most instances, the PCHB appears to have selected either the lowest back calculated number available or Puget Sound background levels, whichever was lower," for limits on fill contaminants. ER 109. The record is to the contrary.

The PCHB, after considering all the evidence, based its modified fill criteria primarily upon modeling prepared by Ecology's own expert, Chung K. Yee, using the "fixed parameter three phase partitioning model" (ER 554), and also upon natural background levels for soil metals established in Department of Ecology Publication No. 94-115.[6] PCHB Order at 59-60 (ER 554-555).

The three-phased fixed partitioning model is established in WAC 173-340-747 and is used to "back-calculate" a soil concentration for contaminants necessary to meet state surface and groundwater standards. The three phases are soil, water

[6] The Executive Summary of this publication (ER 471-472) provides state-wide and regional 90th percentile values for certain metals in soil.

and air, and the very purpose of this model is to calculate an appropriate standard for contaminants in a particular phase, based upon a known limit for a contaminant in another phase. *Id.*

Using this model, Mr. Yee started with known standards for contaminants in the water phase (both surface water and groundwater) and determined the appropriate soil phase concentrations (in milligrams of contaminants allowed per kilogram of soil (mg/kg)) necessary to ensure compliance with surface and groundwater standards.

If three-phase calculated levels were lower than background, the PCHB adjusted the acceptable pollutant level **up** to natural background levels. PCHB Order at 62-63 (ER 557-558). For example, Mr. Yee's model determined that 2.92 mg/kg was the appropriate soil concentration for arsenic needed to ensure compliance with state groundwater standards, but because natural background for arsenic in soil is listed as 7 mg/kg, the PCHB adjusted the limit **up** to natural background. PCHB Order at 62 (ER 557). Similar **upward** adjustments were made for cadmium and mercury. *Id.* Thus, the ROD is flatly wrong when it characterizes the PCHB decision as an arbitrary selection of the lowest number available.

The Corps also ignored PCHB testimony from Ecology that Project fill should not include any soil contaminated with petroleum products. An Ecology

official testified to the PCHB 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." ER 987. By rejecting the fill pollutant limits which the PCHB was thus prompted to impose, the Corps arbitrarily allows use of fill contaminated by gasoline at levels as high as 30 mg/kg, and diesel and heavy oils at levels as high as 2000 mg/kg. ER 48.

The Corps ROD suggests that the PCHB's pollution limits to protect against degradation of state water quality could be disregarded because the U.S. Fish and Wildlife Service and National Marine Fisheries Services (collectively the "Services") approved less restrictive fill pollutant limits as part of the Services' review of the project under the Endangered Species Act, 16 U.S.C. §§1531-1544 ("ESA"). ROD at 27 (ER 109), 93 (ER 175). However, the Services' May 22, 2001, Biological Opinion (ER 816A), which the PCHB had before it[7] is on its face based on a limited set of documents -- not on the extensive record, live testimony and cross-examination of experts presented to the PCHB.

Moreover, the scope of analysis under CWA §401/404 is much broader than the Services' limited review on a limited record under the ESA, which is focused upon specific effects on listed species, not on preventing degradation generally to all aquatic resources. ER 816C. For the most part, the Biological Opinion

[7] It can be found in the PCHB record -- which is in its entirety part of the Corps record -- at PCHB AR 017396-017486.

concluded that these species were not particularly affected due to their prevalent location as compared to the location of the impact areas themselves. *See, e.g.,* BO at 47-49 (ER 816D-816F) ("low likelihood" of Bull Trout "feeding or occupying these areas for a significant length of time").

The Corps ROD further alleges that, in contrast to higher limits allowed by the Services, the PCHB set standards lower than natural background levels for chromium, selenium, and silver. ER 109. In fact, the PCHB set the limit for chromium at 42 mg/kg, which is the state-wide natural background level for chromium. ER 471-472.

With respect to selenium and silver, while rejecting the PCHB's work, the Corps ROD does not reference any part of its record to indicate what natural background levels are for these contaminants. Earlier, the Port had represented to the Services that natural background levels for these two contaminants were not available. ER 816G (Table 1 from Biological Opinion -- indicating that the table was "adapted from J. Lynch, Stoel Rives"). On this basis, the Services approved use of fill material containing up to 5 mg/kg of selenium and silver, which Stoel Rives, Port counsel, represented to the Services as the Practical Quantitation Limit ("PQL"), the lowest level routinely detectable for those metals. *Id.* However, it came out at trial before the PCHB that there were, in fact, more accurate PQLs for selenium and silver, based upon different testing methods. The Port had cited to

the Services only the highest PQLs (5 mg/kg) even though other methods (including methods actually used by the Port) could detect those toxics at levels below 0.5 mg/kg. ER 556 (PCHB Order at 61). Accordingly, the PCHB set the fill criteria for selenium and silver to the levels calculated by Ecology's Mr. Yee as necessary for water quality protection. ER 554.

The Corps excluded the PCHB limits on pollutants based upon a cavalier prejudgment of the importance of such protection and upon an erroneous understanding of the science in the record supporting the PCHB decision. The exclusion was arbitrary and capricious.

i. The District Court erred in admitting extra-record evidence from the Port regarding natural background levels for metals in soil while excluding extra-record material offered by ACC.

The District Court refused to allow submission of extra-record materials from ACC. ACC offered in District Court evidence showing that the Port had drastically modified its planned improvements for Sea-Tac (ER 1034); that the FAA had issued a new forecast shedding even more doubt on the proponents' demand projections for Sea-Tac (ER 1035); and, most importantly, that technology allowing landings on both existing runways during poor weather had recently been approved by the FAA and was already being implemented by Alaska Airlines, one of the Port's largest "customers" (ER 1036). *See* ER 1030-1041 (Hockaday Declaration). The court erroneously rejected these materials. ER 1067. ACC

cited *Association of Pacific Fisheries v. EPA*, 615 F.2d 794 (9th Cir., 1980), and *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), for the proposition that "[i]f the studies showed that the agency proceeded upon assumptions that were entirely fictional or utterly without scientific support, then post-decisional data might be utilized by the party challenging the regulation." *Pacific Fisheries*, 615 F.2d at 812.

The District Court permitted, however, one-sided submission from the Port of selected pages from an Ecology Publication, "Natural Background Soil Metals Concentrations in Washington State." The Port had submitted the Executive Summary of this publication to both the PCHB (ER 976-977) and Corps (ER 471-472), but never offered the full report.

The District Court nevertheless permitted the Port to selectively submit to it additional pages from the report, attached to a declaration (ER 1042-1061), which the Port then used to argue that the PCHB set the standard for selenium and silver lower than natural background. The court reasoned that:

> It is evident from the presence of the executive summary in the record that the Corps considered the report. Extra-record information regarding documents that the agency relies on but were not included in the record is admissible. S. W. Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1433, 1450 (9th Cir. 1996).

Summary Judgment Order at 7 (ER 1068).

The court's reasoning, that the Corps must have considered that which is found nowhere in the record, constitutes an abuse of discretion. *S. W. Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1433, 1447 (9th Cir. 1996). It is more evident that, since the Port chose not to submit the entire report to the federal agencies during ESA review, nor to the PCHB, nor to the Corps, its omission was tactical. Earlier submission would have contradicted the Port's inaccurate representations to the Services that there were no available natural background levels for selenium or silver, resulting in a standard set at the Port's preferred, but inaccurate, PQL of 5 mg/kg. ER 941; ER 816G (Table 1 from Biological Opinion). In accepting this extra-record information in the Port's Reply Brief, the District Court rewarded the Port's tactics and considered data not placed before any agency, or available for rebuttal on the record by the public (including ACC).

Further, although construed as helpful to the defendants, the Port's extra-record submission should have undercut the Corps' decision and Port arguments. In analyzing fill contaminant limits, the PCHB started with the three phase calculations, prepared by Ecology's own expert using standard equations in state regulations (WAC 173-340-747 (equation 747-1) and WAC 173-340-720(4)(b)(A) (equation 720-1). ER 975A-975B. That modeling work was prepared for the very

purpose of determining the level of contaminants allowable within soil (in mg/kg) without violating state surface water and groundwater quality standards.

Mr. Yee calculated that, in order to assure compliance with State surface water standards, no more than 0.52 mg/kg of selenium and 0.28 mg/kg of silver could be permitted. ER 975A. The Port claimed (and the Corps agreed) that these levels are slightly lower than natural background levels, which are reported in the extra-record evidence offered with the Port's reply brief in District Court as 0.78 mg/kg for selenium and 0.61 for silver. ER 1060. The difference the Port complains about is 0.26 mg/kg for selenium and 0.33 mg/kg for silver. Perhaps if the Port had been forthcoming with its information sooner, the PCHB might have adjusted the fill limits for these constituents up to the slightly higher natural background, as it did with arsenic, cadmium, and mercury. PCHB Order at 62 (ER 557). However, this minor discrepancy only highlights the arbitrary, much higher levels set in the Corps decision hiking contaminant limits for selenium and silver to 5 mg/kg (almost ten times natural background levels) based upon the clearly mistaken premise that testing procedures could not detect them below that level.

3. The Corps' Exclusion of the PCHB's §401 Certification Conditions for Mitigation of Wetland Impacts Violated the CWA and Was Arbitrary and Capricious.

a. The Pollution Control Hearings Board added three critical conditions to the §401 certification.

The PCHB's 139-page decision paid careful attention to the insufficiency of the Port's Natural Resources Mitigation Plan ("NRMP"). After conducting a two-week trial at which all parties' experts testified and were subject to cross-examination, the Board had no choice but to enter findings that state water quality standards were not satisfied by the September 2001 §401 certification which had been negotiated between Ecology and the Port. In contrast, the Corps conducted its review process in such a manner that ACC and members of the public could only learn of Port contentions after substantial delays by submitting FOIA requests and waiting for the agency to produce the requested materials, while at the same time the Corps automatically provided ACC expert submissions to the Port. In many instances, therefore, ACC was not even aware of Port claims on various issues until after the Corps had accepted them and moved on. ER 456-457, 488.

With respect to wetland hydroperiod, the Board found that the Port's plan would only monitor wetland groundwater levels in March and April, "during some of the wettest times of the year," but "won't monitor whether the wetland will function during the driest months (August through October)," when problems were likely to arise. PCHB Order at 78-79 (ER 573-574). The Board identified an

obvious need "to modify the performance standard for wetlands to ensure the Port matches the hydroperiods of the wetlands pre- and post project, in order to maintain and perpetuate wetland characteristics, such as standing or flowing water, wetland resources, and wetland functions." ER 574. The Board therefore added Condition 10 to the §401 Certification:

> 10. The performance standard for wetlands is modified so that the Port matches the hydroperiods of the wetlands pre- and post project, in order to assure the long-term maintenance and perpetuation of wetland characteristics, such as standing of flowing water, wetland resources, and wetland functions.

The Board also rejected the Port's attempt to get credit for wetland buffers and the surface of an existing lake as mitigation for wetland destruction:

> 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... 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.

ER 574-575.

The Board similarly rejected the Port's attempt to gain mitigation credit for "preservation" of existing, already-protected wetlands:

> The Board is also not persuaded the preservation of the existing wetlands, identified as adjacent to Borrow Area 3, qualifies for mitigation credit. Ecology and the Port have argued, without any citation in support of their contention, this wetland is not protected under existing law. We are not persuaded by this argument.

ER 575. Ultimately the Board concluded that "Ecology erred in using upland buffers to mitigate for wetland impacts, counting lake surface area, and allowing preservation of areas already protected under existing state laws and regulations, to be counted as mitigation." ER 624.

The Board further found that "the goal of Ecology was to have the Port replace all impacted wetland functions in-basin" (*id.* at 71), but 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." ER 569. The Board concluded that, "out-of-basin mitigation should occur only after all reasonable in-basin options have been evaluated." ER 625.

After correcting for these errors, the Board found that "the Port has not yet fully mitigated the impacts to the filled wetlands and wetland functions." ER 575-576.

In response to these findings, the Board added Conditions 11 and 12:

> 11. The Port shall mitigate for on-site wetland loss as 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.
>
> 12. Condition (D)(1)(h) is modified so that if the future wetland delineations show the wetland boundaries have decreased, additional in-basin mitigation shall be required.

ER 632.

In imposing these three new wetland conditions (Nos. 10, 11 and 12), the PCHB concluded that:

> [W]etlands are waters of the state protected by the state's water quality standards. For there to be reasonable assurance the Port's Third Runway proposal complies with water quality standards, there must be reasonable assurance that impacts to wetlands will be mitigated in a manner consistent with Washington State's anti-degradation policy.

ER 622-623, citing WAC 173-201A-020[8] and WAC 173-201A-070(1). The Board continued, "[t]he anti-degradation policy as applied to wetlands mandates that impacts be avoided, minimized, and compensated... Here, the Port's proposal does not comply with the anti-degradation standard because it adequately [sic] compensates for or replaces lost resources." ER 623; *see* ER 626.

b. The Corps systematically excluded key PCHB wetland mitigations.

In issuing the ROD, the Corps adopted and utilized the same Port Mitigation Plan that was incorporated into the September 2001 §401 certification which the PCHB had rejected. ER 95 (ROD at 13). Attempting to undo the Board's work, the Corps refused to include PCHB Condition 10 requiring the Port to maintain wetland hydroperiod; it awarded mitigation credit to the Port for lake surface acreage, riparian buffers and protection of existing, already-protected wetlands

[8] Chapter 173-201A WAC was revised in July 2003. The applicable version of the regulations at issue in this case is included in the Addendum to this Brief.

(contrary to PCHB Condition 11); and it rejected PCHB Condition 12 requiring the Port to compensate for future wetland loss attributable to the project. ER 96-99.

The Corps thus systematically excluded key wetland mitigations the PCHB had added to the §401 Certification as necessary to ensure there would be "no violation of water quality standards." ER 626 (Board Order at 131); ER 97-99 (ROD at 15-17). The exclusion was not "harmless error." Far from it, these measures were found by the Board to be essential to its finding that Washington's water quality standards would not be impaired by the project.

c. The exclusion of key PCHB protections was arbitrary and capricious.

The Corps' duty to incorporate §401 conditions is not optional. 33 U.S.C. §1341(d); *American Rivers v. FERC, supra*, 129 F.3d at 107; *U.S. Dep't of the Interior v. FERC, supra; Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA, supra*. The Corps violated the Clean Water Act in failing to do so.

The Corps' exclusion of key PCHB conditions was arbitrary and capricious pursuant to the Administrative Procedures Act, 5 U.S.C. §706(2)(a). The PCHB conditions required significant changes to the Port's Natural Resource Mitigation Plan ("NRMP") and other documents associated with the runway project. Rather than call for these changes, the Corps adopted the Port's existing, unrevised NRMP into the §404 permit virtually wholesale. ER 345.

Corps regulations require permit denial where:

> There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem; . . .
>
> The proposed discharge does not include all appropriate and practical measures to minimize potential harm to the aquatic system; or
>
> There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these guidelines.

40 C.F.R. §230.12(3)(i), (iii) and (iv).

The PCHB's modified wetland conditions constituted a fully vetted alternative for the runway project, adjudicated practicable by a state tribunal with expertise in the field. The Corps' rejection of this alternative and its acceptance of the Port's unmodified NRMP left the field in limbo. Will the project comply with the Corps permit, or the state order? In the absence of an NRMP modified per the PCHB requirements, the Corps lacked "sufficient information to make a reasonable judgment" as to the appropriate conditions for the §404 permit. *See* ER 492-495, 460-469 (ACC letters to Corps dated 9/20/02, 11/13/02). The result was a Corps permit that cannot be reconciled with a parallel Washington order detailing a more protective alternative.

C. The Corps Failed to Adhere to Its Own Regulations and Was Arbitrary and Capricious in Its §404 Public Interest Analysis.

Before issuing a §404 decision, the Corps is required to independently evaluate the public interest in a project, including:

> a careful weighing of all those factors that become relevant in a particular case. The benefits which reasonably may be expected to accrue from the proposal

> must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and, if so, the conditions under which it would be allowed to occur, are therefore determined by the outcome of this general balancing process.

33 C.F.R. §320.4(a)(1). Corps review must determine "...the relative extent of the public and private need for the proposed structure or work," and "the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited." 33 C.F.R. §320.4(a)(2). Permit applications contrary to the public interest must be denied. 33 C.F.R. §320.4(a)(1).

This Corps review must be independent. For example, the Corps may not rely upon a NEPA document to satisfy its obligation to conduct a separate and independent needs analysis. *North Carolina v. Colonel Ronald E. Hudson, et al.,* 665 F. Supp. 428, 445-47 (E.D. NC 1987). As part of its independent needs analysis, the Corps must give "[f]ull consideration and appropriate weight... to all comments, including those of federal, state and local agencies, and other experts on matters within their expertise." 33 C.F.R. §320.4(a)(3) (emphasis added). As this Court has held in an analogous (NEPA) context, the Corps may not fail "to look through" an applicant's claims rather than demonstrate that it "critically evaluated" them. *See Ocean Advocates, supra,* 361 F.3d at 1126 (2004). Nor may it "ignore evidence placed before it by interested parties nor rely on post-hoc rationalizations

or justifications in supporting its decisions." *Crutchfield v. United States Corps of Engineers,* 214 F. Supp.2d 593, 620 (E.D. Virginia 2002) (internal quotations and citations omitted).

The significance of requiring the Corps to conduct an independent needs analysis cannot be overstated:

> [The Corps] may utilize reports and facts derived from outside reports and sources... but the Corps is responsible for the independent verification of specifically challenged information obtained from applicants or outside consultants... If the Corps bases its conclusion on entirely false premises or on information, even when its attention is specifically directed to possible defects in its information, we would have difficulty describing its conclusion as reasoned; we would have to call them arbitrary and capricious.

Van Abbema, et al. v. Fornell, et al., 807 F.2d 633, 639, (7th Cir. 1986) (internal citations and quotations omitted) (emphasis added). The Corps "cannot approve a public interest review entirely indifferent to the facts. The Corps has a duty to ensure the accuracy of information that is important to the decision it is making, at least when obvious errors are brought clearly to its attention." *Id.* at 642-43 ("record teeming with specific factual challenges to reports tendered to the Corps" requires Corps to "verify in a reasonable way the data on which it relies").

While the Corps District Engineer professed here that he "had questions regarding the need for the project," he relied only on project proponents Port and FAA for answers (ER 147), instead of obtaining or performing independent "searching analysis." ER 185-186. The Corps' 404(b)(1) Evaluation in Appendix

B of its ROD (ER 281-341) is not the "independent analysis of the proposed project purpose and need" which the Corps ROD touts. ROD at 65 (ER 147) and 132 (ER 214). It concludes deferentially,[9] with little or no independent analysis, that the Corps "believes" the FAA/Port need claims. *See* 404(b)(1) Eval. at pp. 12 (ER 295), 13 (ER 296), 23 (ER 306).

1. The Corps Did Not Independently Analyze Data Demonstrating that the Project Is Not in the Public Interest.

The Port first conceived of the third runway more than a decade ago when, paralleling the early inflation of the economic bubble, air traffic operations were on the rise and airlines were ostensibly profitable. The world has changed since; what was predicted then has not come to pass now. Six months before the Corps issued its permit, airline chief executives were warning that the industry would have to shrink by a third before profitability returned. ER 646. "It's a simple issue of supply and demand, but it's one that airlines have failed to address for 50 years." ER 647. "The airline industry's profit margin averaged just 3% from 1947 to 2000, even before the September 11 attacks cut air travel by a third and led to losses that were greater than all the profit ever generated by airlines in the history

[9] Ironically, in the one area where the Corps did obtain an independent assessment in response to public expert comments (including those from ACC), the independent review confirmed many aspects of the public's critique. ER 639-644 (Corps' retention of University of Georgia Prof. Rhett Jackson for independent review of Port's Comprehensive Stormwater Management Plan).

of flying." *Id.* Four months prior to the Corps decision, U.S. Airways filed for bankruptcy. ER 441. A month prior to the Corps' decision, National Airlines ceased operations and all of its flights in and out of Sea-Tac were cancelled. ER 470A. Eleven days prior to the Corps decision, the CEO of Continental Airlines said that a 15% cut in flights across the nation's air system would be needed for airlines to become profitable. ER 441. And, four days prior, United Airlines filed for bankruptcy, the sixth largest ever filed. ER 442. In addition, American Airlines, Delta and almost all the other large carriers continued to lose money. ER 441, ER 470A.

With this trend as a backdrop, Over the course of the Corps' public interest review, ACC repeatedly challenged the Corps's assumption that FAA/Port data justified the Runway as in the public interest.[10] Specific critiques and ample data placed in the record by ACC's internationally recognized aviation experts, including Dr. Stephen Hockaday,[11] as well as ongoing public domain analysis

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[10] *See, e.g.,* ER 822A-822S; ER 700-715; ER 802; ER 645-652; and ER 457A-457Q, as well as other ACC submissions to the Corps quoted and cited in this section.

[11] Dr. Hockaday is an internationally recognized aviation expert with more than 25 years experience in aviation research, planning, design and operations. He is a professor at California Polytechnic State University where his responsibilities include teaching and research in aviation issues. He has conducted air traffic management research and studies for NASA, the FAA, and the Air Force. Dr. Hockaday also headed Eurocontrol, an international organization with 28 member countries which assists in the development of airport and airspace infrastructure in Europe. His curriculum vitae merits the Court's review and can be found at ER

(placed before the Corps by ACC), showed: 1) commencing prior to September 11, 2001, a dramatic and sustained drop in flights and delays at Sea-Tac as a result of fundamental, long-term changes in the airline industry; and 2) a less environmentally harmful alternative which would satisfy any public need "for an efficient regional air transportation system to meet anticipated future demand." ROD at 3 (ER 85).

a. Independent analysis demonstrates that sacrificing aquatic resources for a third runway is not in the public interest.

The "need" to sacrifice streams and wetlands and spend (at least) eight hundred million dollars for an 8,500-foot stretch of concrete is founded on outdated demand forecasts generated by computerized models rather than actual demand figures. ER 186. The Corps, in deferring to the FAA, points out that the FAA professes to have "reevaluated" its demand forecast in an August 2001 ROD (ER 787-795), but concluded that a new set of forecasts would not produce substantially different numbers. ROD at 104 (ER 186); FAA ROD at App. A, p. 10 (ER 795). However, as the Corps was advised by Dr. Hockaday, the only 2001 data considered in that FAA update, for the year's first five months (prior to 9/11, therefore), clearly confirmed the downward trend in air travel demand which Dr. Hockaday also identified. ER 792.

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807. Another ACC expert, Dr. Geoffrey Gosling, is a member of the research staff of the Institute of Transportation Studies at the University of California, Berkley. ER 823 (curriculum vitae).

In a June 15, 2001, letter to the Corps, Dr. Hockaday wrote, "the number of aircraft using Sea-Tac is now going down," with aircraft operations at Sea-Tac declining a full 6% from April 2000 to April 2001. ER 807. Yet, the average number of passengers per aircraft increased by 7% during this period, reflecting a recognition by the industry, even prior to September 11, that its prior business model of proliferating flight operations was unsustainable. ER 798. As Dr. Hockaday observed, "This trend of increasing numbers of passengers per aircraft allows passenger traffic to grow while the number of aircraft operations does not grow." *Id.* *See also* ER 788-791; ER 681-683; ER 647.

This downward trend was compounded by a significant decline in both passenger demand and aircraft operations starting immediately after September 11, 2001. ER 734; ER 732. "These new impacts have changed the aviation industry fundamentally, have completely out-dated and invalidated old assumptions and strategies, and require that any previously planned investments be critically reexamined to determine their suitability in the new situation." *Id.* *See also* ER 727-729; ER 649; ER 489-491; ER 453-455; ER 451-452; ER 448-450; ER 443-447; ER 1024A-1024B.

Coincidentally, one day prior to the Corps' ROD issuance on December 13, 2002, Dr. Hockaday advised the Corps (for at least the tenth time) that the downward trend in air traffic he had identified two years earlier continued in the

latest monthly statistics: "Traffic peaked at Sea-Tac two years ago with 446,066 aircraft operations taking place in 2000. Since then traffic has declined continuously, and is now nearly 20% less in late 2002, with a total of approximately 363,000 aircraft operations expected for 2002." ER 436 (emphasis added). "Delays in 2000 were low, according to FAA, with 99% of aircraft operations not being delayed. Delays in 2002 are even less than in 2000, and are expected to remain low for the foreseeable future." *Id.* With the lower traffic levels, Sea-Tac now has significant additional excess capacity; and "any suggestion that a third runway is needed is clearly misplaced." ER 733A.

Dr. Hockaday prepared a graph for the Corps showing historical air traffic (in blue) and the FSEIS forecasts (in pink). ER 438. The graph vividly illustrates that there were only approximately 364,000 aircraft operations in 2002: about the same as 1992, when the economic bubble began inflating and the industry embarked on the business plan that has now proven to be unsustainable. ER 437. The current airport has an annual maximum capacity of 460,000 aircraft operations. ER 793. If the Corps had revised the FAA/Corps forecast taking into consideration the ongoing drop in operations, the revised forecast would have shown that traffic would not return to year 2000 levels and the current airport would be able to handle forecasted demand until 2020 and beyond -- even assuming an immediate "recovery" at the unrealistically high growth rates forecast

in the original FSEIS forecast (Instant Recovery Forecast shown on Dr. Hockaday's chart in red). ER 437-438. Had the Corps performed or required a recovery forecast taking into consideration current realities and a more realistic "recovery" rate (Normal Recovery Forecast in green), it would have recognized that air traffic demand in 2020 will be 20% less than the capacity that FAA has acknowledged for Sea-Tac's existing two runways. ER 439.

ACC's aviation experts were not alone in pointing out the lack of need for the Runway. In 1997, when business was still good, the airlines themselves, which later curbed their tongues (perhaps because the Port controls gate assignments and other vital airport functions), raised serious questions when faced with funding the project:

> America West Airlines: "questions the amount of time delay currently experienced at SEA [SeaTac] and if a 3rd runway is needed to produce the time savings. Or is the delay the result of factors beyond our control such as weather or inefficient utilization of gate/aircraft operations?" ER 857.
>
> Delta: is "not convinced that the delay analysis used in justification of the project is valid. The potential delay reductions being attributed to construction of the runway may not materialize because the delays appear to be caused by factors other than runway capacity such as en route weather or weather at downline hubs." ER 858.
>
> TWA: "remains unconvinced that the benefits of the third runway outweigh the projected costs" even assuming the runway will produce some delay costs savings not attributable to other external factors. ER 859.
>
> United Airlines: calculates that "future passenger and operations growth are currently significantly below the level necessary to justify a new runway for the foreseeable future." ER 869. "The airlines do not dispute the amount of delay at the airport, but believe that almost none of that delay is attributable to

> the lack of a third runway. Indeed, the causes of delays at SEA include the following: inbound flights weather delays in Chicago, San Francisco and other cities; strong head winds for planes heading into Seattle; mechanical delays such as a broken catering cart in Dallas; ill crew members; and irregular passenger boarding processes. Based on an airline review of delay data, less than 30 seconds of delay is attributable to the lack of a third runway." ER 860.

The FAA's own May 2001 "Benchmark Report" confirmed, inadvertently, that any delay attributable to Sea-Tac did not justify the Third Runway. *See* FAA Airport Capacity Benchmark Report 2001 ("FAA Benchmark Report") at ER 812 and analyzed by Dr. Hockaday at ER 803. Sea-Tac was not among the eight airports it identified as experiencing significant passenger delays. ER 814. To the contrary, the Report found that, "only about 1% of all flights at Seattle are delayed more than 15 minutes from their estimated flight plan arrival time," and that "some amount of congestion is not inconsistent with efficient and affordable air transportation." ER 816, ER 813. The Report showed that 19 of the top 20 airports around the country have delays greater than Sea-Tac. ER 804, ER 816A.

Neither the FAA nor the Port submitted the Benchmark Report to the Corps. Instead, Dr. Hockaday did (ER 802), noting that it establishes that "only in rare cases in poor weather conditions are there limited periods of excess demand" at Sea-Tac (ER 803), and that "no valid justification exists for the construction of the new runway in light of the FAA's Benchmark Study." ER 805.

Despite Dr. Hockaday's analysis of the actual delay data, the Corps failed to

conduct any independent assessment of it, but instead accepted uncritically the flawed computer simulation data models (ER 695-699, ER 473) relied upon the FAA/Port project sponsors to forecast delay. ROD at 104 (ER 186). The Corps did so even though it confessed in an email to the FAA and Port after Dr. Hockaday brought the FAA Report to the Corps' attention that their submissions had not given support for an independent conclusion that the third runway was needed:

> Below is our thought process for trying to get our arms around the questions of delay...
>
> The Port and FAA identified poor weather delay as the major justification for the construction of the 3rd runway.
>
> The Port and FAA have predicted that delays during poor weather will result in an unacceptable level of delay in the planning future.
>
> We (the Corps) originally assumed that it would be relatively easy to demonstrate that the model trends were consistent with real conditions recorded at the airport. What we now understand, however, is that it may be difficult to demonstrate how poor weather currently results in operational delay with the existing data.
>
> The Bottom Line: We understand that a 3rd runway will improve efficiency at Sea-Tac and we understand that this would be a desirable condition for the Port. However we have not yet independently arrived at the conclusion that a 3rd runway is *necessary*.

ER 796 (italics in original; underlining added).

A little more than a month to the day after the Corps Project Manager questioned the need for a third runway under "real conditions recorded at the airport," Mohammed Atta flew American Airlines Flight 11 into the North Tower,

and the downward trend in air operations identified by Dr. Hockaday accelerated.

The Corps ROD glosses over the dramatic and continuing downward slide in air travel nationally and at Sea-Tac, concluding that "recent forecasts predict continued increases in aircraft operations and continued worsening of aircraft delay during poor weather conditions." ER 85. The "support" for this conclusion is a claim in an August 7, 2002, letter from a local Seattle FAA manager that "operational levels nationwide are expected to return to pre-September 11th levels sometime in 2003 or 2004." ROD at 104 (ER 186); Letter from FAA to Corps dated August 7, 2002, at p. 2 (ER 636). Rather than independently scrutinizing this wishful statement in light of the trends based on solid data which Dr. Hockaday (and others) had identified even prior to September 11, the Corps ROD simply proclaims "the FAA is the Federal expert in forecasting aviation demand." ER 186 The FAA has many roles, including as a promoter/funder of airport construction, as well as in aviation forecasts. It is an identified proponent of the Port's project. However, the FAA can be wrong. Nothing in the CWA or the Corps regulations excuses the Corps from independently analyzing a contested issue rather than deferring to (even) a federal project proponent's analysis subject to significant challenge. The failure to do so was both unlawful and arbitrary and capricious.

b. There are practicable alternatives less damaging to aquatic resources.

As part of its public interest review, the Corps must consider "the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work." 33 C.F.R. §320.4(a)(2). It further must conduct a "substantial investigation of alternatives on its own," particularly when information provided by applicants "is specifically and credibly challenged as inaccurate." *Van Abbema,* 807 F.2d at 642 ("CWA prevents the COE from issuing a §404(b) permit if there is a less damaging practicable alternative. 40 C.F.R. §230.10(a)."); *Utahns for Better Transportation v. U.S. D.O.T.,* 305 F.3d 1152, 1187 (10th Cir. 2002).[12]

An alternative is practicable "if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." 40 C.F.R. §230.10(a)(2).

During the Corps public interest review, the FAA itself identified a practicable alternative by acknowledging in its August 2001 ROD that, "If the Third Runway were not completed at Sea-Tac, it is reasonable to assume that the FAA would take actions (such as air traffic instrument procedures and possibly

[12] "No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem." 40 C.F.R. §230.10(a). These guidelines are binding on the Corps and are incorporated by reference in the Corps regulations. 33 C.F.R. §320.4(1).

actions involving the locations of navigation aids), to enable more landings to occur during poor weather." ER 794. The FAA defined a new alternative incorporating technological and demand management improvements for capacity exceeding the FAA's (inflated) forecasted demand while reducing ostensible poor-weather delays:

> It is reasonable to assume that without the Third Runway, actions such as the Localizer Directional Aid (LDA) approach would be instituted. An LDA would improve the ability to land during VFR2 conditions at Sea-Tac but would not affect landings during IFR conditions; the net benefit would be an increase of about 6.5% on an annual basis from an LDA. In addition, other technological improvements may occur toward the forecast horizon of 2010 that would also incrementally increase the number of hourly landings during poor weather. Technologies that may be available in later years, couple with LDA, could increase the overall operating capability of the existing two runway system at SeaTac from the 460,000 predicted in the FEIS/FSEIS to in excess of 500,000 operations. Together these systems would be expected to increase the operating capability of the two runway system. Precisely how much higher than 500,000 would depend on the aircraft fleet mix at the time, technology, and weather conditions in any respective year.

ER 794.

ACC repeatedly offered to the Corps expert analysis in support of such an alternative. ER 700-715; ER 720-723; ER 653-654; ER 474-475. The Corps demurred. The "No Action" alternative in the Corps 404(b) Evaluation (ER 306) assumes "no major improvement at any Puget Sound airport except those already underway." ER 304. It did not conduct any independent analysis of new technologies as alternatives to meet project purpose, despite the acknowledgements in the FAA's August 2001 ROD. Relying upon outdated FAA comments from

several years earlier, the Corps rotely rejected the use of new technologies to reduce ostensible delays in poor weather (ER 308), despite a record replete with evidence to the contrary, including some based on the FAA's own pronouncements away from the Sea-Tac arena. ER 806, 815, 816 (May 2001 FAA Benchmark Report); ER 705-706; ER 798; ER 797; ER 735.

2. The Corps Erred in Failing to Independently Verify and Analyze Current Cost Data.

The Corps is required to consider the economics of a proposal as part of its public interest review to determine whether destruction of aquatic resources can be justified as what the Corps sometimes calls "cost-beneficial." 33 C.F.R. §320.4(a)(1). The Corps may not defer to others but "must credibly attempt to appraise economic benefit," particularly where "a proposal's benefits are entirely economic and its costs environmental ..." *Van Abbema, supra,* 807 F.2d at 639. Cost is a significant factor in the required Corps analysis of alternatives, particularly because the comparison of an alternative with an application proposal must include cost on both sides of the equation in assessing an alternative's practicability. *Utahns, supra,* 305 F.3d at 1187; 40 C.F.R. §230.10(a)(2); ER 801. The NEPA principle that misleading economic information may subvert NEPA's purpose of providing decision-makers and the public an accurate assessment upon

which to evaluate the proposed project"[13] applies in this context as well. *See, e.g., Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 446 (4th Cir. 1996); *Daly v. Volpe*, 350 F. Supp. 252, 259 (W.D. Wash. 1972).

In 1996 the Port estimated it would cost nearly a half billion dollars to build the 8500 foot third runway , making it "the most expensive runway ever built in the United States." ER 856. The last Port estimate, released in 1999, projected total cost to be $773 million. *E.g.*, ER 818-821. By comparison, a new runway at Denver International is being built for $160 million. ER 650.

The Port has since 1999 steadfastly refused to provide a current budget, claiming "that it is not necessary to include a cost-based criterion in the 404(b)(1) evaluation" ER 822. At the same time, the Port was announcing in an August 2002 SEC filing relating to the sale of its bonds that environmental conditions "were likely to result in significant additional costs." ER 459.

ACC repeatedly asked the Corps to require the Port to provide an updated cost estimate, but the Corps refused to do so. ER 730, 726, 495-496. The lack of a current (and complete) cost estimate, however, did not stop the Corps from concluding "the proposed project is determined to still be cost-beneficial." ROD at 41 (ER 123).

As the Tenth Circuit held in *Utahns, supra,* "The COE violated its own

[13] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.,* 235 F. Supp. 2d 1143, 1157 (W.D. Wash. 2002).

regulations by failing to verify the cost estimates provided by the applicant." 305 F.3d at 1187. Where there is "insufficient information to determine compliance, the [Corps] Guidelines require that no permit be issued." *Id.* Here, the Corps pretense of performing its required cost and alternatives analyses without obtaining and verifying current cost data is the essence of unlawful, arbitrary and capricious action.

VII. CONCLUSION

The decision of the District Court granting summary judgment for defendants (Port and Corps) and denying summary judgment for appellant ACC should be reversed. The Court should order the §404 permit vacated as arbitrary, capricious, and contrary to law for failure to incorporate the PCHB conditions. The Court should further direct that, if a new §404 permit is issued, it must, consistent with CWA §401(d), incorporate the PCHB conditions.

In the alternative, the District Court decision should be reversed, the §404 permit vacated, and the Port application ordered denied because the PCHB Stay, setting aside the Ecology certification within one year of application, divested the Corps of the authority to approve a §404 permit per CWA §401(a)(1).

In the alternative, the District Court decision should be reversed, and the §404 permit vacated, and remanded with instructions that the Corps conduct an independent public interest and alternatives analysis, including review of current

cost data and independent consideration of alternatives (including independent scrutiny of forecasts and technologies).

Finally, this Court should either reverse and remand due to the District Court's acceptance of the Port's extra-record evidence and/or reverse and remand with instructions to the District Court to consider ACC's proffered extra-record evidence, which the District Court excluded.

IX. STATEMENT OF RELATED CASES

No other pending cases in this Court are related to this one.

DATED this 7th day of May, 2004.

Respectfully submitted,

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Revised FORM 8

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PURSUANT TO CIRCUIT RULE 32-1

Case No. 04-35011

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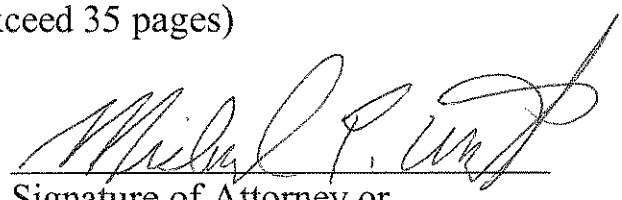

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