No. 73419-4
THE SUPREME COURT OF WASHINGTON

PORT OF SEATTLE, a port district of the State of Washington,
Petitioner,
v.
THE POLLUTION CONTROL HEARINGS BOARD, an agency of the State of Washington,
Respondent,

AIRPORT COMMUNITIES COALITION; and CITIZENS AGAINST SEA-TAC EXPANSION,
Petitioners,
v.
STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, an agency of the State of Washington,
Petitioner.

RESPONDENT/CROSS-PETITIONER AIRPORT COMMUNITIES COALITION'S REPLY IN SUPPORT OF ITS EMERGENCY MOTION FOR INJUNCTIVE RELIEF PURSUANT TO RAP 8.3

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I. Introduction

The Port has acknowledged to the media in response to ACC's Motion that it plans not only to fill wetlands in the near term but also to implement its proposal to "rechannel" Miller Creek (a euphemism for destroying the natural creek and moving it elsewhere so that the Third Runway can be constructed). *See* Eglick Decl. in Support of ACC's Reply at Ex. A, p. 2. Further, as detailed in Respondent/Cross-Petitioner Citizens Against Sea-Tac Expansion's Joinder in Airport Communities Coalition's Emergency Motion for Injunctive Relief ("CASE Joinder"), the work which the Port proposes to commence prior to a decision on the merits by this Court involves a host of status quo altering events, and is not limited to fill placement. *See* CASE Joinder at pp. 2-3. These facts are significant and reflect the Port's misunderstanding of the posture of this case. It has no inherent right to violate the PCHB Order or defy this Court's jurisdiction, even if it believes it will ultimately prevail on the merits of its appeal. It is not free to alter the status quo on the site, preempting the Court's ability to provide effective relief. An injunction is clearly appropriate to preserve the status quo while the parties await a final decision from this Court.

II. AUTHORITY AND ARGUMENT

A. The PCHB Decision Is an Enforceable Order, Binding on the Port and Department of Ecology.

The Port suggests (Answer at 1) that the § 401 Certification and the PCHB Order concerning it, which are now on appeal to this Court, are

irrelevant to its activities. Neither the Port nor Ecology have ever claimed this before, including during the lengthy briefing period or subsequent extensive oral argument before the Court in November. In fact, the PCHB Order on Ecology's certification represents a binding determination by the PCHB as to what must be done (and what cannot be done) in order to ensure compliance with state water quality standards, the state Water Pollution Control Act, as well as, of course, the aspects of the federal Clean Water Act administered by the state. In other words, contrary to what the Port now tells this Court for the first time in its Answer to ACC's Motion, the Port is not free to fill wetlands or destroy/relocate Class AA streams or take any other action in violation of the PCHB's Order, regardless of whether such actions would be permitted by the Army Corps of Engineers under its separate permitting regime.[1]

The PCHB decision is in fact labeled an Order (AR 000774), as is the § 401 Certification issued by Ecology (AR 016891). That Order has

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[1] The Corps' realm is not the application of state water quality standards. Under § 401 of the federal Clean Water Act ("CWA"), that is the province of the state, including this Court. That which is permissible under the "arbitrary and capricious" standard applied in federal court review of an Army Corps CWA § 404 decision is not automatically permissible under the distinct and independent state water quality standards. The CWA requires compliance with both. In fact, Judge Rothstein acknowledged as much in the decision which the Port cites (Answer at 2-3), explicitly recognizing that the state could impose a stricter standard than the Corps, and that, in such a case, the Corps' standard would likely have to yield:

> it is the permittee who would most likely approach the Corps to modify the permit to incorporate any stricter state standards so that the permittee would face a consistent set of requirements.

Order dated August 18, 2003, in U.S. District Court Case No. C02-2483R, at p. 15 (copy attached to Port's Answer).

independent effect and is separately enforceable under both state and federal law. For example, the Certification itself states:

> In view of the foregoing and in accordance with 33 U.S.C. 1341 [CWA § 401], RCW 90.48.260 and Chapter 173-201A WAC, by this Order water quality certification is granted to the Port, subject to the following conditions ...

AR 016891 (Certification at p. 2). The Certification further states:

> Any person who fails to comply with any provision of this order shall be liable for a penalty of up to ten thousand dollars ($10,000.00) per violation for each day of continuing noncompliance. Violations of this order shall be addressed in accordance with the requirements of RCW 90.42 and RCW 43.21B.[2]

AR 016891 (Certification at p. 2). In short, contrary to the Port's latest claims,[3] the PCHB Order here is far from merely advisory and has independent regulatory effect.

B. <u>The Port's Claim of Urgent Need to Commence Construction Is Disingenuous at Best</u>.

The Port has offered what is by now its routine claim of economic harm if it is not permitted to act just as it pleases -- and right away. However, such self-serving claims do not provide a colorable basis for altering the status quo before this Court has issued a mandate finally resolving the merits of the appeals pending before it. That is especially

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[2] Chapter 43.21B RCW creates the PCHB and grants it jurisdiction over Clean Water Act enforcement orders. RCW 43.21B.110.

[3] Significantly, the Court will note that the Department of Ecology has <u>not</u> joined in these arguments by the Port.

the case here, where the Port's claims of urgency are no more substantial than the proverbial Emperor's clothes.

There is now a wealth of data on the public record that the "need" for a billion-dollar 8500-foot runway has long since evaporated -- if it was ever really here in the first place. The aircraft demand projections which the Port started using a decade and more ago to justify the Third Runway have now been discredited and discarded for several years. This is explained in detail in the attached Declaration of Dr. Stephen Hockaday, a preeminent national expert consultant to airports as well as the FAA, the Air Force, NASA, and the European Air Control Authority on matters of airport planning. *See* Hockaday Declaration at ¶¶ 2-12 and Ex. A (Vita). As Dr. Hockaday explains, the changes in the last several years in the aviation industry and at Sea-Tac have been far-reaching:

> The data show that air traffic has declined rapidly and continually over the last four years and is at low levels not seen for fifteen years. The Port's traffic data show that there were 354,714 air traffic operations in 2003, a drop of more than 20% compared with the 445,677 air traffic operations in 2000. Even if air traffic immediately started to grow at the same high rates that occurred between 1988 and 2000, it would take until 2015 for traffic to recover to the levels that were experienced in 2000. The traffic data show no sign of any such growth; instead, traffic continues to decline. In fact, as of January 2004, air traffic operations at Sea-Tac were declining even more rapidly and were 22% below the levels of four years earlier.

Declaration of Dr. Stephen L. M. Hockaday in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Reply in Support of Its Emergency Motion for Injunctive Relief Pursuant to RAP 8.3 ("Hockaday Decl.), at ¶ 18. These changes leave the Third Runway as a project without a purpose, and, at a minimum, as a project which is not needed within the far foreseeable future:

> The lower FAA air traffic forecast, the lower Port air traffic data, and the higher costs and lower business demand are each causing the arrival demand (the number of aircraft wanting to land) in poor weather to be significantly less now, and significantly less in the future, than was forecast in the FSEIS. As a result, any need for a third runway is correspondingly minimized and any delays to aircraft in poor weather that were estimated in the FSEIS and used to justify a third runway are also minimized. For example, FSEIS Exhibit 2-2 on page 2-9 shows that 10% to 20% reductions in demand would produce 50% to 75% reductions in delay, ensuring that delays would be significantly reduced and maintained at acceptable levels. These 20% or more reductions in demand have already occurred at Sea-Tac.

Id. at ¶ 22. While the Port's institutional hubris prevents it from recognizing these facts, its own data speak volumes, undercutting its claim that preserving the status quo until this Court has ruled will cause irreparable injury. There is no economic imperative for filling wetlands and obliterating streams today for a project in search of a purpose.

Further, even assuming that the Port's protestations that haste is essential were colorable, they simply do not square with its concomitant soothing claim that it will not alter the status quo in any event until June at

the earliest. The Port demands that the Court not issue an injunction preventing alteration of the status quo because, the Port says, the status quo must be altered immediately to protect the public interest. Yet, in the same breath, the Port states that an injunction is not necessary because it will not alter the status quo in any event until June at the earliest.[4] There is no time to wait for the Port to get its story straight, and every reason to issue an injunction now to preserve the status quo (whether it is because the Port will not alter the status quo anyway, or because the Port intends to proceed and, as the case law reflects, the fruits of the pending appeal should not be destroyed before the case has been resolved).

The Port also suggests that, "ACC's legal challenges continue to delay construction of the Third Runway." Port Answer at 5.[5] In fact, the Port is the author of its own delay. The Port is the chief appellant in the case now pending here. It is the Port which does not wish to comply with the PCHB's Order adding 16 conditions necessary under state water

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[4] Of course, the Port makes no promises as to what will happen after June.

[5] The Port (Answer at 3) cites ACC's request for a 30-day extension of the briefing schedule in the Ninth Circuit appeal of the U.S. District Court decision as somehow demonstrating an agenda for delay. ACC asked for a one-month extension of the Ninth Circuit briefing schedule in part because of a request by the Assistant Attorney General for the Washington Department of Ecology, which wanted such an extension so that it could participate as *amicus curiae* in the Ninth Circuit case in support of one of ACC's objections to Judge Rothstein's ruling -- the same role it had played as amicus before Judge Rothstein. Moreover, the Port never filed opposition papers with the Ninth Circuit concerning the 30-day extension. Indeed, at one point, Port counsel for the Ninth Circuit case asked ACC to agree to a 60-day extension, but then withdrew the request when it learned that ACC had already obtained an extension for only 30 days.

quality standards to protect against pollution. And, it is the Port which, as its Answer to this motion explicitly acknowledges, has determined instead to proceed without complying with conditions which the Port has challenged -- but which this Court has not yet (and may never) overturn. This latter point is well-illustrated by the fact that the Port freely concedes in its Answer that the planning in which it has been engaged depends on violating the provision of the PCHB Order prohibiting use of the Port's SPLP workplan to place toxic contaminated fill at the site. Answer at 6. The Port and Ecology are now, for example, in the process of approving fill for importation to the site using the very SPLP workplan which the Pollution Control Hearings Board barred. Port Answer at 6.[6]

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[6] Ecology's Answer to ACC's Motion points to Ecology's October 1, 2003, letter (which it never produced in response to ACC's public disclosure request) as demonstrating that Ecology has not endorsed violation of the PCHB Order. At best, this letter can be read as an admonition to the Port to proceed at its own risk in violating the PCHB Order. More likely, in light of its closing paragraph, it can be read as Ecology's prospective, blanket endorsement of the Port's use of the SPLP workplan despite the PCHB prohibition and the pending case before this Court:

> Finally, Ecology agrees that its approval of this document, which will become the basis for the formal bid specifications, constitutes our final approval of this document [the Work Plan to Qualify Fill Materials which incorporates use of SPLP] and the process that will be used by contractors to assess suitability of fill for use in the Third Runway embankment. We agree that Ecology's review will be limited to determining only (1) whether the bidder complied with the provisions of the specification, and (2) whether the bidder's data meet the established criteria.

Marchioro Decl. at Ex. 1, p. 2 (October 1, 2003, Letter from Ecology's Ann Kenny to Port's Paul Agid).

C. The Port's Attempt to Reargue the Merits of Its SPLP Workplan Offers No Basis for Its Use in Light of the PCHB Order which Remains in Effect.

Throughout its Answer opposing an injunction, the Port reargues the merits of issues it lost before the PCHB. These have already been reargued before this Court in the Port's briefs and in the hearing on the merits of its appeal. What the Port fails to acknowledge in its re-re-argument is that the PCHB made its decision based on clear evidence that the Port's SPLP workplan had already failed to provide protection required under state water quality standards.

For example, in its Answer (at pp. 8-10), the Port again argues that the use of the SPLP test poses no threat to the environment because it is allowed for some purposes by the U.S. Environmental Protection Agency and for some purposes under the state's Model Toxics Control Act. However, several of the deficiencies identified by the Pollution Control Hearings Board pertained to how the Port proposed to use the SPLP testing procedure in its "workplan" for the Third Runway Project. For example, the PCHB noted that the SPLP workplan "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." AR 000838 (PCHB Order at p. 65). The Board further noted that:

> 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.

AR 000839 (PCHB Order at p. 66).

The Board further noted that there was no statistically meaningful test protocol for using the Port's SPLP workplan, as: "only one SPLP sample is required to be collected for each original screening sample that exceeds the screening criteria." *Id.*

The PCHB also recognized uncontroverted evidence that the Port's SPLP workplan was incapable of routinely detecting toxic contaminants at levels set in applicable regulations:

> Ten of the 13 metals listed in the §401 certification have a hardness-adjusted freshwater 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.

AR 000838-839 (PCHB Order at 65-66). This PCHB finding was based on an SPLP report prepared by the Port's own consultants and used to approve importation to the site of fill material that exceeded the

numeric screening criteria (contamination limits) from the Black River Quarry site. AR 019785-839.[7]

The Port is attempting to relitigate the merits of a case which it lost after a two-week trial before the PCHB. The PCHB explicitly found, concluded and determined that the use of the Port-proposed SPLP procedure was not consistent with protection of the environment and aquatic resources because it would allow toxic contaminated fill to be placed at the site. AR 000840 (PCHB Order at 67). The Port has appealed that decision of the PCHB, but its appeal has not yet been successful. Given the Board's findings and the evidence in the PCHB record supporting them, the issue of the protectiveness of the Port's proposed SPLP workplan is clearly a debatable issue for purposes of RAP 8.3. It would therefore warrant grant of an injunction even if it were ACC pursuing an appeal on this issue. Here, where the Port is appealing an adverse ruling, its suggestion that no injunction is necessary would allow

[7] The Port contends (Answer at 16, n. 8) that ACC misrepresented the record and that the SPLP test was only used to determine whether "uncontaminated fill" would pose a threat to water quality. This is simply not true. During cross-examination a Port consultant admitted that the Port has already imported to the airport site petroleum contaminated soils from the Black River Quarry site, the Summit Ridge site, the First Avenue Bridge site, and from three additional locations at the Airport. Clark, Tr. at 9-0138, line 18, to 9-0140, line 2. The Black River Quarry site was approved using the SPLP test. Clark, Tr. at 9-0134, line 14, to 9-0136, line 5. Moreover, four of the seven source sites utilized by the Port were approved using the SPLP test -- after it was determined that the sites contained toxic contaminants at higher concentrations than would be permitted under the applicable limits. The Port's apparent argument here is that sites with toxic concentrations at levels determined to pose a risk to water quality are not "contaminated" unless they are polluted so badly as to be Superfund sites.

it to prevail on the ground before it has ever prevailed, in any forum (PCHB or this Court), on the merits.

Finally, in its Answer (at p. 6) the Port suggests that it included use of the SPLP test in bid specifications as a "supplemental tool for evaluation of fill" in response to the passage of SSB 5787. Of course, when the Bill was passed, ACC challenged the validity of the Bill and the claim that it could preempt the PCHB Order and this Court's review, in a direct petition to this Court (Case No. 74039-9). In opposing the petition, the Port argued that the issues raised by the legislation would be addressed later in this action. The Supreme Court Commissioner ultimately agreed and granted dismissal, but only upon the explicit understanding that the issue of the validity of SSB 5787 would be litigated in the pending appeal. *See* Declaration of Peter J. Eglick in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Emergency Motion for Injunctive Relief Pursuant to RAP 8.3 ("Eglick Decl."), Exhibit B.

At this point, there is no adjudication of the effect, if any, of SSB 5787 on the PCHB's Final Order or this Court's review. The Port cannot on the one hand avoid prompt adjudication of the Bill by claiming its validity can be addressed in pending litigation, while on the other hand claim it can take action pursuant to the Bill as if its effect had already been determined.

D. Wetland Filling and Stream Alteration Constitute Irreparable Environmental Injury.

The Port's treatment of the PCHB Order requirements which it has appealed -- but which are still in effect until, if, and when (if ever) overturned by this Court in response to the Port's appeal -- is equally telling. As noted in ACC's Motion, the PCHB also required the Port to amend its plan to mitigate wetland impacts:

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

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

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

PCHB Order at pp. 80-81 (AR 000853-854) (emphasis added). ACC's emergency motion noted that, despite the PCHB's clear order in this regard, and the Port's obvious awareness of it -- after all, the Port has appealed the PCHB Order embodying these requirements, including specifically Condition No. 11 -- public record documents obtained by ACC suggested that the Port is planning on proceeding without complying with the PCHB Order, even in the absence of a ruling from this Court allowing it to do so.[8]

In apparent response on this point, the Port attaches to its Answer the Declaration of Robin Kordik dated April 8, 2004, which purports to demonstrate compliance with the PCHB's Condition 11. However, this demonstration of compliance is illusory, as this Court can readily determine by review, for example, of the attachment to the Kordik Declaration. That attachment is a draft report dated April, 2004[9] -- labeled

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[8] As it did in its briefing on the merits, the Port mischaracterizes the PCHB Order as "approving" the Port's wetland mitigation package. Port Answer at 11-12. It acknowledges -- as it must -- that the PCHB § 401 approval Order was subject to the PCHB's conditions, but it completely ignores what those conditions -- specifically Condition 11 -- require. The Port states that it appealed Condition 11 "because it [the condition] 'urged' the Port to consider enhancing the Walker Creek headwaters." Answer at 11, n. 5. However, the main thrust of Condition 11 was the PCHB ruling as unacceptable the Port's plan to use buffer areas and already-protected wetlands as "mitigation," thus requiring a substantial amount of additional mitigation acreage. The Port acts in its Answer as if that requirement did not exist. The Port's appeal on this point is before the Court on the merits and has been fully briefed. *See* ACC/CASE Response Br. at 97-115.

[9] Ms. Kordik in her Declaration asserts that the draft report is in fact dated April 8, 2004 -- i.e., the same day the Port submitted its Answer to this Court and the same day Ms. Kordik signed her Declaration. Kordik Decl. at p. 1, ¶ 4.

prominently on its cover as a "Draft" -- purporting to be a "Compliance Report, PCHB Ruling, Condition 11." In other words, the "report," by its own date, was only prepared after ACC made its March 19, 2004, demand upon Ecology and then filed an injunction motion with this Court on April 2, 2004. No wonder the "report" dated April 8, the day it was submitted to this Court, is labeled "Draft" on every page. Further, a preliminary review of the "report" (for which there is no indication that it has been accepted by Ecology -- or, even more importantly, by the PCHB) demonstrates that it is in large part an assemblage of materials which the PCHB already deemed unpersuasive. The Port's literally last-second cobbling together of such a document, labeled "draft," stands in stark contrast to its own recitation of the over one year of activity in which it says it has engaged to proceed with construction of the project in violation of the PCHB Order which it has appealed. Apparently, the Port was proceeding on the assumption that it would never be called to account for compliance with the PCHB Order.

E. An Injunction Is Necessary to Maintain the Status Quo and Preserve the Potential Fruits of the ACC and CASE Appeals.

The Port's Answer not only ignores that it is an appellant on a majority of issues in the pending appeals, but also ignores ACC's and CASE's appeal grounds which could lead to either a drastically different

project, or an outright denial. For example, ACC argued (ACC Op. Br. at 9-15) that the Board erred in making a finding of reasonable assurance premised upon the Port's promise of future submittals not yet in existence (even more gossamer than the Port's "report" labeled "draft" and dated April 8 -- the date of its submission to the Court). ACC also argued (ACC Op. Br. at 23-36) that the out-of-basin mitigation (several miles away in Auburn) so completely failed to mitigate the project's actual impacts as to require denial of the proposal. Similarly, CASE argued (Op. Br. at 43-45) that the PCHB properly identified the scope and standard of review as of the time of certification, but improperly applied it, and (at pp. 55-57) that, given the numerous deficiencies identified by the PCHB, it should have remanded the matter back to Ecology to determine if the project could even be modified to comply with the Board's findings and conclusions. A ruling by the Court in favor of ACC or CASE on any of these grounds could result in complete reversal of the PCHB Order and denial of the Certification. This relief will not be available if the Port has already commenced destruction of the aquatic resources on the site.

Similarly, the Port's claim that, "If this court later decides that more mitigation is necessary, the Port can provide it" (Port Answer at 21),

misses the point of RAP 8.3. Here, the PCHB has already decided that more mitigation is necessary. The Port has not provided it.[10]

The Port argues (Answer at 15-22) that this fact does not demonstrate an injury for purposes of RAP 8.3. Unlike the case of a preliminary injunction, however, RAP 8.3 requires only a showing that, absent court intervention, the fruits of a party's appeal are in jeopardy. *Boeing v. Sierracin,* 43 Wn. App. 288, 291, 716 P.2d 956 (Div. 1 1985). In this case, the fruits of ACC/CASE's appeal are in jeopardy because the environmental damage from the Port's construction activities could not be undone.

It is common sense, a matter of expert testimony,[11] and a precept of case law that the construction of the project and displacement of wetlands, streams and a significant portion of a watershed is, in itself, an environmental injury that is both significant and irreparable. *Amoco Production Co., et al. v. Village of Gambrell, et al.*, 480 U.S. 531,545 (1987) ("Environmental injury, by its nature . . . is often permanent or at least of long duration, i. e., irreparable."); *accord, Kucera v. Department of Transportation,* 140 Wn.2d 200, 211 (2000); *United States v. Akers,*

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[10] Again, whether the federal court on a different standard has approved the Army Corps allowance of out-of-basin mitigation has nothing to do with what the PCHB has required under a state Certification Order to protect aquatic resources and state water quality standards.

[11] *See* the Declaration of Dyanne Sheldon submitted with ACC's Motion, and the record citations to testimony and declarations by Amanda Azous cited in the Motion.

1985 U.S. Dist. Lexis 23436 (E.D. CA 1985 at *27-28) (disrupting wetlands' ecological functions constitutes an irreparable injury to valuable public resource); *California, et al. v. Marsh, et al.*, 687 F. Supp. 495, 501 (N.D. CA 1988) (holding that there would be "substantial harm to the environment if the wetlands are filled before the Corps is able to fully assess [Oakland Airport expansion's] impacts.").

The Port argues to the contrary, citing *Citizens Alliance v. Wynn*, 908 F. Supp. 825 (W.D. Wash. 1995) as support for the proposition that "the law allows the harm associated with filling wetlands to be cured through mitigation. Answer at 20. Thus, that harm cannot be considered irreparable." However, when *Citizens Alliance* is given more than a headnote level analysis, it is clearly not applicable here. First, the adequacy of the mitigation was not in serious dispute in *Citizens Alliance.* The Court there noted that "plaintiff fails to explain why the Court cannot likewise consider the effect of the mitigation plan, the adequacy of which Plaintiff does not challenge, in assessing whether irreparable injury will occur." Id. at 834 (emphasis added). By contrast, here, the adequacy of the mitigation plan was challenged, and the PCHB, in part, upheld the challenges and held the plan inadequate.[12]

[12] Moreover, in this case a significant portion of the mitigation is off-site and out of the affected watershed basin (near Auburn), while in *Citizens Alliance* 56.5 acres of wetland

Moreover, *Citizens Alliance* was decided under different legal standards. That case involved a request for a temporary restraining order and a preliminary injunction at the trial court level. Because the underlying legal issue was issuance of the Corp's 404 permit, Citizens had the burden of showing a probability of success on the merits or that serious questions were raised under the "highly deferential" arbitrary or capricious standard of review. *Id.* at 830. The Court concluded that "Plaintiff shows little to no probability of success on the merits" (*id.* at 830), but then addressed the irreparable harm issue in dicta. *Id.* at 833 ("Although this determination alone supports the Court's denial of Plaintiff's motions, the Court nevertheless addresses the remaining issues of irreparable injury and balance of hardships"). The Court's views on the nature of the injury asserted were thus colored by its earlier statement that "the degree of irreparable injury required increases as the probability of success on the merits decreases." Id. at p. 829.

In this case, ACC does not need to show that the PCHB's decision was arbitrary or capricious to prevail. For many aspects of the review pending before this Court, the burden is on the appellant Port. For example, in order to defeat the Board's findings and conclusions regarding wetlands and the SPLP workplan, the Port and Ecology bear the burden

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would be created "in the immediate vicinity" of the proposal to mitigate project impacts. *Id.* at 834.

under the APA's standards of review. RCW 34.05.570(1)(a) and (3). Moreover, as noted above, the traditional preliminary injunction standard does not apply in determining whether relief should be granted. Once the appellate court accepts review, the authority to suspend, modify or grant injunctive relief rests solely with the discretion of the appellate court, guided by the standard set forth in RAP 8.3.

III. Conclusion

The Port's argument boils down to a claim that it is right on the merits and therefore it should be able to proceed as it pleases before the Court says so. This is not the standard under RAP 8.3. The Port complains that an injunction would result in added cost. But the Port chose to put itself in this position by taking the risk of proceeding with construction plans and bids as if the pending case would make no difference. The Port cannot defeat an injunction by blaming ACC -- or this Court -- for the consequences of the Port's own gamble. ACC's Motion should be granted and the status quo maintained at the site pending issuance of a mandate by the Court.

RESPECTFULLY SUBMITTED this 9 day of April, 2004.

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CERTIFICATE OF SERVICE

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

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

On this 9th day of April, 2004, I caused to be sent via electronic facsimile (fax) and via U.S. Mail, first-class, a true and correct copy of:

- Respondent/Cross-Petitioner Airport Communities Coalition's Reply in Support of Its Emergency Motion for Injunctive Relief Pursuant to RAP 8.3, with attached Certificate of Service;
- Declaration of Dr. Stephen L. M. Hockaday in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Reply in Support of Its Emergency Motion for Injunctive Relief Pursuant to RAP 8.3, with Exhibit; and
- Declaration of Peter J. Eglick in Support of Respondent/Cross-Petitioner Airport Communities Coalition's Reply in Support of Its Emergency Motion for Injunctive Relief Pursuant to RAP 8.3, with Exhibit,

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

DATED this 9th day of April, 2004, at Seattle, Washington.

Andrea Grad

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