No. 73419-4

SUPREME COURT OF THE STATE 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; AIRPORT COMMUNITIES COALITION; and CITIZENS AGAINST SEATAC EXPANSION,

Respondents,

v.

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

Respondent Below.

PORT OF SEATTLE'S ANSWER TO AIRPORT COMMUNITIES COALITION'S EMERGENCY MOTION FOR INJUNCTIVE RELIEF PURSUANT TO RAP 8.3

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I. IDENTITY OF RESPONDING PARTY

Petitioner Port of Seattle (Port) responds to the Emergency Motion for Injunctive Relief Pursuant to RAP 8.3 filed by Respondent Airport Communities Coalition (ACC).

II. STATEMENT OF RELIEF SOUGHT

The Port requests that ACC's motion be denied in its entirety and that the Port be allowed to continue with planning and construction of its Master Plan Update projects, including the Third Runway.

III. FACTS RELEVANT TO MOTION

A. Purpose and History of the 401 Certification Issued to the Port.

The parties briefed the merits of this case last year, and the Court heard oral argument on November 18, 2003. A decision is pending.

This case arises out of a certification issued by the Washington Department of Ecology (Ecology) under section 401 of the Federal Clean Water Act. 33 U.S.C. §1341. The 401 certification is not a permit that authorizes construction or filling activities. Instead, under section 404 of the Clean Water Act, the U.S. Army Corps of Engineers (Corps) issues permits to dredge and fill in waters of the United States. 33 U.S.C. §1344. The Corps permit is referred to as a 404 permit. The 401 certification informs the Corps whether and under what terms a project could be built without violating state water quality standards. Once the state weighs in

on compliance with water quality standards, the Corps issues a federal permit allowing the construction to proceed.

After extensive study, Ecology issued a 401 certification to the Port on September 21, 2001[1] setting forth 33 pages of conditions with which the Port must comply in order to build its project consistent with state water quality standards. ACC appealed the 401 certification to the Pollution Control Hearings Board (PCHB or Board), which held a two-week hearing in March 2002. The Board issued its decision later that year, on August 12, 2002. The PCHB affirmed Ecology's issuance of the 401 certification, but added 16 conditions to those already required by Ecology. The Port, ACC, and Ecology appealed the Board's decision, and the case made its way to the Supreme Court via a Petition for Discretionary Review.

Shortly after the Board rendered its decision, the Corps incorporated all of Ecology's conditions in the 404 permit and included some, but not all, of the Board's additional conditions. *See Airport Communities Coalition v. Graves,* 280 F.Supp.2d 1207 (W.D. Wash. 2003).[2] ACC appealed the 404 permit to the U.S. District Court, which affirmed the Corps' decision, allowing the project to proceed. *Id.* In its

[1] An earlier certification was issued in August 2001, and both the Port and ACC appealed it. The Port resolved its appeal issues with Ecology, resulting in issuance of a new certification in September, which ACC appealed.

order, the court rejected the same arguments that ACC now claims will lead to irreparable harm. Specifically, the court ruled that it was reasonable for the Corps to allow use of the Synthetic Precipitation Leaching Procedure (SPLP) to determine the suitability of fill material, since SPLP is a scientifically-recognized test. *Id.* at 1224. With regard to wetlands, the court rejected ACC's claims that the Corps improperly calculated the amount of wetland functions to be lost, and that off-site mitigation is improper. *Id.* at 1225-26.

ACC appealed Judge Rothstein's decision to the Ninth Circuit. Significantly, however, ACC did not move for a stay of the decision even though the 404 permit approved by Judge Rothstein is the permit that authorizes the Port to fill wetlands. Instead, ACC requested an extension of the briefing schedule in the 404 appeal, which the Port opposed. The Ninth Circuit granted ACC's request for delay, making the opening briefs in that case not due until May 2004. Rather than request a stay or injunctive relief from the federal courts, where the validity of the operative permit is being reviewed, ACC has apparently, for strategic reasons, chosen this forum to move for an injunction. As noted above, the 401 certification is not a permit that authorizes wetland filling. Instead, it is a

[2] A copy of the decision is attached to this response for convenient reference.

state certification used by federal agencies in issuing permits under the federal Clean Water Act.

B. Construction of a Third Runway and Associated Master Plan Update Projects is Important to the Region and An Injunction Would Cause Significant Harm to the Public.

The outcome of this case is a matter of great public importance for the State of Washington and the Puget Sound region in particular, a fact that has been recognized by the PCHB, by the Court of Appeals and by this Court. In October 2002, shortly after its decision in the case, the PCHB issued a Certificate of Appealability stating that its final order met the criteria for immediate review in the Court of Appeals. AR 1, 7.[3] That is, the case presents both fundamental and urgent state-wide or regional issues, and is likely to have significant precedential value. AR 4-6; RCW 34.05.518(3)(b). Division 1 of the Court of Appeals agreed that several issues in the case "involve issues of broad public import that require prompt and ultimate determination that meet the criteria set forth in RCW 2.06.030(2)(3)," and certified the case to this Court. *See* Order of Certification (January 13, 2003). On March 6, 2003, this Court accepted discretionary review, finding that the case is a "matter of great regional importance." *See* Ruling Accepting Certification at 2-3.

[3] Citations to the administrative record in this case are referred to herein as "AR."

Ecology issued the 401 certification more than two and one-half years ago, yet ACC's legal challenges continue to delay construction of the Third Runway. Hoping to perform field work during the 2004 construction season, in the spring and early summer of 2003 the Port began the lengthy and complicated process of translating the 401 certification, the PCHB's added conditions, the 404 permit requirements, and the requirements of U.S. Fish & Wildlife's Biological Opinion into specifications for use by potential bidders for the project's construction work.[4] *See* Declaration of John Rothnie at ¶4. The Port's efforts produced a work plan that was submitted to Ecology on June 30, 2003 and approved by Ecology in early October 2003. *Id.* at ¶6. After Ecology's approval, the Port produced formal bid specifications, communicated those specifications to the contracting community, and held meetings to discuss a number of issues, in particular the fill criteria, since use of numeric fill criteria is a novel concept that may be unique to the Port's project. *Id.* at ¶¶7-9.

[4] ACC implies that the Port and Ecology did not disclose to the Court last July, when the Commissioner heard oral argument on ACC's Petition Against State Officer, the extent of on-going preparations for construction of the Third Runway. As explained here, the planning process for the project is very lengthy. The Port had to begin preparing last year to be ready to start construction during the 2004 construction season. Its efforts in 2003 were limited, however, to planning. No construction, and certainly no work of any kind that could cause environmental harm, was undertaken. No site work was imminent in 2003 and, as described in the Declaration of John Rothnie, no fill can be brought in and no work in wetland areas can occur until mid-June of this year.

While the Port was in the process of preparing for construction, the Washington Legislature passed SSB 5787, which approved the use of SPLP for evaluating the quality of fill material. *Id.* at ¶3. In response to that legislative change, the Port included in its specifications use of SPLP as a supplementary tool for evaluation of fill. *Id.* at ¶5. On August 18, 2003, the U.S. District Court for the Western District of Washington affirmed the Corps' issuance of a 404 permit to the Port. The 404 permit allowed construction to proceed using SPLP in the same manner that Ecology's 401 certification did. The 404 permit also approved the Port's wetlands mitigation plan, including off-site mitigation, in the same manner as Ecology's 401 certification.

ACC's motion for an injunction comes at a critical time for project construction. Pursuant to a public process, the Port received bids from contractors to supply fill for the runway embankment. *Id.* at ¶8. Ecology is now reviewing the testing data and results for the fill sources identified by the bidders. *Id.* at ¶10. The Port must make a decision very soon whether to award a construction contract or to forego construction for yet another season. *Id.* at ¶14. If the Port is not able to make the decision to proceed by June 1, it will have no choice but to postpone construction until 2005. *Id.* This will add at least $25 million in cost to a project that has been delayed numerous times due to the activities of project

opponents. *Id.* at ¶13. The additional funds will be public funds, so additional delay will be at the public's expense. Apart from the dollar value of delay, if construction does not proceed this year, there will be a direct loss of approximately 900 local jobs that would otherwise be available this year. *Id.* Loss of these jobs is a very significant concern for the region.

Delay has other serious consequences. An injunction prohibiting construction would cause substantial injury to the residents and businesses of the Puget Sound region who rely on timely and cost-effective air travel to meet with customers, ship and receive products, and receive visitors as part of the region's tourism industry. *See* Declaration of Michael Feldman at ¶9. The Third Runway is needed to reduce existing aircraft operating delays in poor weather when aircraft landings and takeoffs are allowed on only one runway rather than two. *Id.* at ¶10. Another delay in building the Third Runway could cause more businesses to relocate elsewhere or to choose not to locate here due to inefficient airport service. *Id.* Port estimates show that a one-year delay in completion of the runway would result in a cost of $180 million to commercial airlines and their passengers who will continue to experience increased travel time and travel-related costs due to the present inefficiencies of the existing airport layout. *Id.*

C. Use of SPLP is Authorized by State and Federal Law and Poses No Threat to the Environment.

The 401 certification for the Third Runway project included stringent fill criteria, or numeric limits, for fill material to be used in constructing the runway embankment. AR 16903-08. Because a large percentage of even pristine soils could not meet these stringent criteria, Ecology allowed the Port to use SPLP to determine whether substances that exceed the fill criteria actually leach at levels that could endanger water quality. AR 16907. The United States Environmental Protection Agency developed the SPLP test method, and Ecology has adopted it for use in Washington. WAC 173-340-747(7). SPLP provides actual measurements, rather than the assumptions used in developing the fill criteria, for determining whether fill may threaten water quality. AR 16427-28 (Testimony of Linn Gould). Far from being a "loophole," as ACC likes to call it, SPLP allows the Port to predict exactly how particular fill material would behave in the Third Runway embankment.

To perform SPLP, fill material is placed in a laboratory container, exposed to an acidic liquid intended to simulate acid rain, and agitated. AR 16428. Thus, SPLP subjects the fill material to conditions harsher than it would encounter in the Third Runway embankment. Then the laboratory removes the liquid and analyzes it to determine how much of the substance of concern leached out from the fill material. *Id.* The

laboratory compares the results to water quality criteria. *Id.* If the substance does not leach, or leaches at low enough levels that it does not threaten water quality, the fill may be used. *Id.*

During the PCHB hearing, the Port presented uncontroverted testimony that SPLP is considered the "gold standard" for determining the extent to which a substance will leach from soil. AR 56712 (Testimony of Linn Gould). None of ACC's witnesses testified that SPLP was an invalid or inappropriate test, or in any way objected to its use. In fact, ACC's expert on matters related to fill testified that "regardless of what the [fill] criteria are, regardless of what the concentrations are of any of these various metals or hydrocarbons in the embankment, the real question is how mobile are they." AR 55422 (Testimony of Dr. Patrick Lucia). This is exactly the question that SPLP answers. AR 6635 (SPLP "is designed to determine the mobility of both organic and inorganic analytes present in liquids, soils, and wastes").

The Corps also permitted the Port to use SPLP to ensure that fill material used to construct the Third Runway embankment would protect water quality. Although the PCHB had prohibited use of SPLP, the Corps decided not to incorporate this prohibition into the 404 permit because it found that SPLP is an effective method for assessing whether metals will leach from soil. The Corps wrote in its Record of Decision for the 404

permit that:

> Regarding Condition 8 (SPLP testing), the SPLP is an EPA recognized test, EPA Method 1312, used to evaluate the potential for leaching metals into ground and surface waters. *This test more realistically assesses metal mobility under actual field conditions and is the method of choice for evaluating the fate and transport of metals.* The USFWS also allowed the use of SPLP testing through their Section 7 B[iological] O[pinion]. They determined the fill criteria, including the use of the SPLP test, were protective of aquatic species, ESA listed species in particular. Because this is a scientifically recognized valid test, I have determined this PCHB condition not allowing S[PLP] testing does not need to be added to the permit.

See Declaration of Gillis E. Reavis, Exhibit A at 27 (footnote omitted) (emphasis added). As explained above, ACC appealed the 404 permit to the U.S. District Court for the Western District of Washington, challenging, among other points, the Corps' decision not to prohibit use of SPLP in determining acceptability of fill. In *ACC v. Graves*, 280 F.Supp.2d 1207 (2003), the Court rejected ACC's arguments, finding the Corps' decision reasonable. As the Court wrote:

> SPLP, however, is a scientifically recognized field test. It has been adopted and used by EPA and is cited in both state and federal regulations as being an appropriate test. *See* WAC 173-340-747; EPA Publication No. SW-846. Thus, it is clear that there is a reasonable basis for the Corps' decision.

Id. at 1224.

D. The Port's Plans to Fill Wetlands Are Consistent with the 401 Certification and the PCHB's Decision.

Ecology's 401 certification requires the Port to implement a detailed wetland mitigation program set out in the Natural Resources Mitigation Plan (NRMP). AR 16895. To construct the Third Runway, the Port will disturb approximately 21 acres of wetlands. The NRMP requires it to mitigate this impact by restoring 11.95 acres, and enhancing another 22.32 acres, of degraded wetlands in sub-basins in and around the airport. AR 844. In addition, the NRMP requires the Port to create 29.98 acres of new wetlands, and to enhance 19.5 acres of existing degraded wetlands, out-of-basin, on a parcel in Auburn. AR 845, 848. Ecology concluded that this mitigation provided reasonable assurance that wetland filling would not violate water quality standards.

The PCHB approved the Port's proposal to fill wetlands, subject to the mitigation described in the Port's NRMP and as modified by conditions in the Board's Order.[5] Specifically, the PCHB found that the Port's mitigation plan would replace all wetland functions in the same

[5] Condition 10 of the PCHB Order requires improved monitoring of wetland hydroperiods. AR 910. Condition 12 requires the Port to provide further in-basin mitigation if future monitoring shows a decrease in the boundaries of remaining wetlands. *Id.* The Port did not appeal either condition, and will meet these additional requirements. The Port did appeal Condition 11 because it "urged" the Port to consider enhancing the Walker Creek headwaters. As the Port explained in its briefing on the merits, this condition is merely advisory and therefore exceeds the PCHB's authority. *See* Port's Opening Brief at 47.

basin in which they would be lost.[6] It further found that the Port's proposal to provide out-of-basin mitigation was permissible under state law. Combined with the mitigation provided in-basin, the large amount of wetland mitigation the Port will provide out-of-basin far exceeds the 2:1 mitigation target Ecology established for the project.[7] The Board concluded that:

> In sum, the board concludes that the Port's proposed mitigation plan, as outlined in the NRMP, and as further conditioned by the Board, provides reasonable assurance there will be no loss of wetland functions and no violation of water quality standards as a result of the wetland fill, stream alteration, or wetland mitigation activities associated with the construction of the improvements at the Airport.

AR 904.

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[6] The sole exception is avian habitat, which the Port will replace out-of-basin to avoid attracting birds near aircraft. The PCHB Order states that, "Under FAA rules, wildlife attractants, such as wetlands, may be sited no closer than 10,000 feet from turbine aircraft movement areas." AR 903. This distance helps prevent airline accidents caused by bird strikes. ACC concedes that replacement of avian habitat is a low priority. *See* ACC's Opening Brief at 35.

[7] ACC claims, incorrectly, that the PCHB ruled that "more in-basin mitigation was required." *See* ACC's Emergency Motion at 2. As the Port explained in its Response Brief, this interpretation cannot be reconciled with the PCHB's wetlands decision when read as a whole. *See* Port's Response to Opening Briefs of ACC and CASE at 24-26. In particular, it is inconsistent with the Board's ultimate conclusion, quoted above, that the Port's mitigation plan provides reasonable assurance that water quality standards will be met.

Since the PCHB issued its Order, however, the Port has conducted further investigation to determine whether any other in-basin mitigation opportunities exist. *See* Declaration of Robin Kordik at ¶4. The Port evaluated 89 potential mitigation sites, most of them for a second time. *Id.* at ¶5. It concluded that none of the sites were suitable. *Id.* Almost all

After Ecology and the PCHB concluded that there is reasonable assurance that the Port's wetland filling plan would comply with water quality standards, the Corps expressly authorized the Port to fill wetlands in the 404 permit. The Corps concluded that:

> The Port has voluntarily proposed mitigation to offset the potential impacts to wetlands and the ecosystems supported by the wetlands. I have evaluated the proposed project and the proposed NRMP, *Stormwater Management Plan*, *Low Streamflow Analysis*, and WHMP and have determined they will result in the creation, restoration, and enhancement of wetlands in a rough proportionality to the project impact, considering both the nature of and the extent of the impact. The proposed plans are reasonable, and have been specifically designed for this project site to compensate for the loss of wetlands on this project site occurring due to construction of the proposed project.

See Declaration of Gillis E. Reavis, Exhibit A at 15. Based on this conclusion, the Corps issued the Port a permit to fill wetlands. The U.S. District Court for the Western District of Washington affirmed the Corps' decision to issue the permit. *See ACC v. Graves,* 280 F.Supp.2d at 1229.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Legal Standard for Injunctive Relief Under RAP 8.3.

Rule of Appellate Procedure 8.3 provides that:

> Except when prohibited by statute, the appellate court has authority to issue orders, before or after acceptance of review or in an original action under Title 16 of these rules, to insure effective and equitable review, including authority

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of the sites were deemed unsuitable because they could not provide ecologically sustainable mitigation.

> to grant injunctive or other relief to a party. The appellate court will ordinarily condition the order on furnishing a bond or other security. A party seeking the relief provided by this rule should use the motion procedure provided in Title 17.

An order may issue where it can be demonstrated that "debatable issues are presented on appeal and the stay is necessary to preserve the fruits of the appeal, after considering the equities of the situation." *Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 759 (1998). However, the appellate court is to exercise this power with caution. *Shamley v. City of Olympia*, 47 Wn. 2d. 124, 126 (1955).

Moreover, this standard is to be applied flexibly, with consideration of the facts before the court or, as some courts have described it, on a "sliding scale":

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

Boeing Co. v. Sierracin Corp., 43 Wn. App. 288, 291 (1986). Logic dictates that where the harm is not as great, the court will look more closely at the merits of the appeal to determine if injunctive or other relief is appropriate.

In considering a RAP 8.3 request, the appellate court is to consider the equities as they relate to both parties, not just the moving party. *See*

Boeing v. Sierracin, 43 Wn. App. at 291. However, the burden of proving that the equities favor issuance of a RAP 8.3 order, and that the sliding scale dictates that such appellate action is appropriate, rests squarely with the moving party. *See Confederated Tribes,* 135 Wn.2d at 759.

B. Use of Fill Material Authorized by the 401 Certification Will Not Cause Environmental Harm and Therefore An Injunction is Unwarranted.

ACC has not demonstrated that environmental harm of any kind, let alone irreparable harm, will occur if the Port begins constructing the Third Runway embankment with fill material deemed suitable for use based on results of SPLP. Neither ACC's motion nor the declarations it submitted allege that any harm will result from use of SPLP to determine whether fill material is acceptable for placement in the embankment.

Instead, as it has done throughout this case, ACC relies on rhetoric rather than evidence to support its argument. For example, its motion claims that the 401 certification allows use of SPLP to approve "fill containing toxic contaminants." *See* ACC's Emergency Motion at 5. This statement is false. The 401 certification strictly prohibits use of any contaminated fill – that is, any fill polluted by human activities. AR 16907-08. Contaminated fill is screened out during the first phase of the fill acceptance process. *Id.* The Port's Work Plan to Qualify Fill Materials states that:

> Fill material will not be accepted from sources that are in whole or in part contaminated, or were previously, even if the contaminated soil has been treated and is now considered "clean."

See Declaration of John Rothnie, Exhibit A at 2. Thus, "fill containing toxic contaminants" would never undergo SPLP testing, and would never be accepted for placement in the Third Runway embankment. SPLP is used only to determine whether *uncontaminated* fill material endangers water quality.[8]

The evidence is overwhelming that using SPLP to evaluate fill material protects water quality. As explained above, the administrative record created during the PCHB proceedings contains unrebutted evidence that SPLP accurately determines whether substances in fill could leach out and harm water quality. The Corps of Engineers has also determined that fill material qualified for use based on SPLP results will protect water quality. When ACC challenged this determination in federal court, the court affirmed. *See ACC v. Graves*, 280 F.Supp.2d at 1224.

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[8] ACC also claims, erroneously, that the administrative record before the PCHB "demonstrated" that the Port previously used SPLP to "excuse importation of admittedly contaminated material." *See* ACC's Emergency Motion at 5. What ACC refers to is testimony from a Port witness that she accepted fill material that failed one or more fill criteria because SPLP showed that the material would not harm water quality. AR 56740-42. This is exactly how the water quality certification contemplates that the Port will use SPLP: to evaluate whether *uncontaminated* fill material containing naturally-occurring substances at levels that exceed the fill criteria actually presents a threat to water quality. There is absolutely no evidence – and certainly no "admission" – that the Port has ever imported contaminated fill material based on SPLP results.

Furthermore, the Washington Legislature has concluded that SPLP is a valid method for ensuring that fill material does not threaten water quality. In 2003, the Legislature passed a bill expressly authorizing Ecology to require the use of leaching tests such as SPLP to determine the suitability of fill material. *See* Laws of 2003, Chapter 210 (now codified at RCW 90.48.530). The statute provides that leaching tests may be used "to ensure that construction projects involving the use of fill material do not pose a threat to water quality." RCW 90.48.530(1). In the statute, the Legislature expressly ratified and approved any requirement to use a leaching test contained in a previously-issued water quality certification, finding that it was "a valid and reliable method for determining concentrations of chemical constituents that can be present in fill material without posing an unacceptable risk of violating water quality standards." *Id.* As a matter of law, therefore, leaching tests such as SPLP are protective of water quality.[9]

ACC may claim that the PCHB would not have prohibited use of SPLP unless it caused injury. However, the PCHB made no findings to

[9] ACC has argued that the leaching test statute is unconstitutional because it violates the separation of powers doctrine. As the Port explained in briefing it filed in this case last year, ACC's constitutional arguments are groundless. *See* Port's Answer to Brief of Environmental Groups *Amicus Curiae* and to ACC/CASE on Constitutionality of SSB 5787. Even if ACC's arguments had merit, the language of RCW 90.48.530(1) makes clear that the Legislature believes leaching tests such as SPLP protect water quality, not threaten it.

this effect. Instead, it wrote in its Order only that it was "concerned about" the use of SPLP, citing five arguments ACC had raised. AR 838-40.

As the Port explained in briefing on the merits of this case, the PCHB's prohibition on use of SPLP is not supported by substantial evidence in the record or by the law. *See* Port's Opening Brief at 35-43 and Port's Reply Brief at 2-10. Of the five concerns the PCHB discussed in its Order, only one is valid – that SPLP results should be compared to groundwater quality criteria as well as surface water quality criteria, to make sure that fill material is protective of all water sources. The Port acknowledged in its Opening Brief that the 401 certification should require it to compare SPLP results to both sets of water quality criteria. *See* Port's Opening Brief at 42. The Port has included this requirement in the Work Plan it prepared for contractors seeking to find fill material suitable for placement in the Third Runway embankment. *See* Declaration of John Rothnie, Exhibit A at 22-23. Under the Work Plan, contractors must compare SPLP results to the most stringent water quality criterion, either groundwater or surface water, as set forth in Table 7.[10] *Id.* Fill

[10] ACC's motion misrepresents Table 7. It claims that the table includes "a completely different set of contaminant limits for fill, most of which are higher (i.e., less protective) than the PCHB-imposed criteria." *See* ACC's Emergency Motion at 8. ACC's suggestion that the Port disregarded the PCHB's fill criteria in this Work Plan is

material is deemed acceptable only if SPLP results show that it meets the more stringent of the two criteria. *Id.* Thus, the Port has addressed the PCHB's concern about protecting groundwater.

ACC did not produce any evidence during the PCHB hearing that use of SPLP would harm water quality, and it has not produced any now to support its motion. The record before the PCHB contains uncontradicted evidence that SPLP is a valid method to ensure that fill material does not harm water quality. Ecology, the Washington Legislature, the Corps of Engineers, and the U.S. District Court for the Western District of Washington are satisfied that SPLP will protect water quality. Thus, ACC cannot demonstrate that any injury, irreparable or otherwise, will result if the Port accepts fill material based on SPLP results showing the material will not cause a violation of water quality criteria.

C. Adequate Mitigation Exists for Wetland Loss So There is No Harm to Support an Injunction.

ACC argues that wetlands, once filled, cannot be recreated, and that filling them therefore causes irreparable injury. However, ACC neglects to mention the extensive mitigation that the Port will conduct to

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completely unfounded. The fill criteria discussed in the Work Plan are those set by the PCHB. *See* Declaration of John Rothnie, Exhibit A at 5.

The numbers in Table 7 are water quality criteria, not fill criteria, as the caption clearly states: "Applicable Water Quality Criteria for Comparison Against SPLP Results." In other words, the table lists the maximum concentrations of metals allowed in leachate

compensate for the impacts of filling. Under both state and federal law, wetland filling is allowed as long as appropriate mitigation is provided. As explained above, the Port received approval from Ecology, the PCHB, and the Corps of Engineers to fill wetlands because all three agencies determined that the Port would adequately mitigate its impacts.

Since the Port will fully mitigate its impacts, filling wetlands does not cause irreparable harm. In *Citizens Alliance to Protect Our Wetlands v. Wynn*, 908 F. Supp. 825 (W.D. Wash. 1995), the court ruled that no irreparable injury would result from wetland filling when a 404 permit required the project proponent to mitigate impacts associated with the filling. The court therefore refused to enjoin the filling pending further judicial proceedings. In other words, the law allows the harm associated with filling wetlands to be cured through mitigation. Thus, that harm cannot be considered "irreparable."

ACC argues, however, that an injunction is necessary to preserve the "fruits" of its appeal. It states that there are "many possible outcomes" to these appeals. *See* ACC's Emergency Motion at 19. However, prohibiting the Port from filling wetlands at all is not one of those possible outcomes. ACC's challenges have focused on the adequacy of mitigation, not on whether wetlands may be filled in the first instance. Even in its

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produced from the SPLP. The table has nothing to do with maximum concentrations of

appeal of the 404 permit – the document that actually authorizes the Port to fill wetlands – ACC claimed only that the "Corps failed to require sufficient mitigation to assure no net loss of wetland function," not that wetlands could not be filled. *See ACC v. Graves,* 280 F.Supp.2d at 1224. Thus, if ACC were to prevail in this appeal, its "fruits" would be a requirement that the Port conduct additional wetland mitigation, not a prohibition on filling wetlands.

It is not necessary to enjoin wetland filling now to preserve these potential "fruits." If this Court later decides that more mitigation is necessary, the Port can provide it.

ACC may claim that this Court might require additional mitigation – specifically, in-basin mitigation – that the Port would be unable to provide. Since the Port has exhausted the in-basin mitigation opportunities, ACC may contend that this potential "fruit" of its appeal cannot be preserved unless the Port is enjoined from filling wetlands.

However, ACC's argument that the Port must mitigate its impacts in-basin is totally devoid of merit. *See Boeing v. Sierracin Corp.*, 43 Wn. App. 288, 291 (1986). As a matter of fact, the Port will mitigate all wetland impacts – except avian habitat, for the public safety reasons discussed above – in-basin. AR 903 (PCHB found that the NRMP

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metals allowed in fill.

"replaces all impacted wetland functions in the impacted basin"). Even if the NRMP did not require this in-basin mitigation, though, the plan would still be adequate because state law expressly authorizes off-site mitigation. RCW 90.74.020.

In briefs it filed on the merits of this case, ACC argued that this state statute is inconsistent with the federal Clean Water Act. ACC's argument assumes that off-site mitigation is not permitted under the Clean Water Act, a point for which ACC has never offered any authority. Federal courts have approved off-site mitigation under the Clean Water Act. In fact, the federal court reviewing the 404 permit for the Third Runway project expressly approved the off-site mitigation called for in the NRMP. *See ACC v. Graves*, 280 F.Supp.2d at 1228 ("Given the impracticability of in-basin mitigation, it was entirely reasonable for the Corps to require out-of-basin mitigation"); *see also Friends of the Earth v. Hintz*, 800 F.2d 822 (9th Cir. 1986) (upholding Corps of Engineers' decision to allow off-site mitigation of wetland impacts).

In summary, if the Court determines that additional wetland mitigation is necessary, the Port will be able to provide it in the future. ACC's argument that all mitigation must occur in-basin is so devoid of merit that it does not present a debatable issue on appeal.

D. The Equities Require That No Injunction Be Issued.

ACC scarcely mentions any possible harm to the Port or the public as a result of granting an injunction in this case. Its argument rests entirely on claims of irreparable harm to its interests. According to ACC, this alleged harm is so great that it makes consideration of the merits of the appeal and the harm to the party being enjoined essentially irrelevant. This argument fails for two reasons. First, as discussed above, there is no real environmental harm, much less irreparable harm, posed by work the Port intends to do in compliance with the 401 certification that Ecology issued in September of 2001. Second, even if some potential harm could be foreseen, the specter of such harm is outweighed by the harm to the Port, area residents and the traveling public that would be caused by granting an injunction.

This Court has declared emphatically that injunctive relief depends on the likelihood of some significant harm. In a case cited by ACC, *Kucera v. State of Washington Department of Transportation,* 140 Wn.2d 200 (2000), the Court stated: "Not surprisingly, there are no Washington decisions that award injunctive relief without at least *first* finding the challenged action is likely to have a significant adverse environmental impact." *Id.* at 219 (emphasis in original). For the reasons discussed

above, neither use of SPLP to test fill material nor the filling of wetland areas is likely to cause significant environmental harm.

ACC argues that wetlands that have been filled cannot be restored, and therefore the fact of filling alone constitutes irreparable harm. This argument, however, ignores the fact that the Port will replace all wetland functions by mitigation, thereby preventing the harm. *Citizens Alliance to Protect Our Wetlands v. Wynn,* 908 F. Supp. 825 (W.D. Wash. 1995). Since Ecology, the PCHB and the Corps of Engineers all concluded that wetland functions would be replaced under the Port's plan, the mitigation program negates any potential harm of filling the wetlands. Similarly, ACC wants to rewrite the PCHB record in an attempt to create evidence showing that SPLP could lead to environmental harm. The evidence to support that claim does not exist in the record, or elsewhere.

Even if it were sufficient for ACC to raise concerns about harm that is unlikely, but might possibly occur, the Court would still be required to look to the "relative interests of the parties and the public" in deciding whether to grant an injunction. *Kucera v. Department of Transportation,* 140 Wn.2d at 221. Those interests must be balanced against any possible harm to the environment.

The evidence presented in the declarations of John Rothnie and Michael Feldman, as well as evidence in the PCHB record, demonstrates

that the harm to the public would be great if an injunction forced the Port to cancel another construction season. ACC attempts to downplay the significance of the harm by describing it as "claims of economic loss" over which the environment always wins. But there are widespread consequences of another year of delay, including the loss of 900 direct jobs, which mean more to those who would be employed than merely the value of the "economic loss." Continuation of delays in air travel not only cause inconvenience and increased cost for travelers, but also hinder the efficient and timely movement of freight necessary for businesses to operate and compete in a global marketplace. While the monetary value of these delays has been estimated at $180 million, the true economic value is likely significantly higher. The region has already lost at least one significant corporate presence due in part to the perception that delays in permitting necessary infrastructure affect the continued viability of the region's business climate. In terms of pure dollars that will be wasted by another year of delay, the figure is $25 million, which in and of itself should outweigh the speculative nature of the harm alleged by ACC.

ACC cannot meet its burden of showing substantial environmental harm, nor can it show that the balance of the equities comes out in its favor. Its request for injunctive relief should therefore be denied.

V. CONCLUSION

For the reasons stated above, ACC's Motion for Injunctive Relief should be denied.

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