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.

DECLARATION OF GILLIS E. REAVIS IN OPPOSITION TO AIRPORT COMMUNITIES COALITION'S MOTION FOR INJUNCTIVE RELIEF

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Gillis E. Reavis declares under penalty of perjury of the laws of the State of Washington:

1. I am over 18 years of age, competent to testify, and have personal knowledge of the facts stated herein.

2. I am one of the attorneys for the Port of Seattle in this case.

3. Attached hereto as Exhibit A, and incorporated herein by reference, are true and correct copies of excerpts from the Department of the Army Record of Decision for Port of Seattle Section 404 Permit (1996-4-02325).

4. The foregoing is true and correct to the best of my knowledge and belief.

SIGNED at Seattle, Washington, this 8th day of April, 2004.

GILLIS E. REAVIS

DEPARTMENT OF THE ARMY
RECORD OF DECISION
FOR
SEATTLE, PORT OF
(1996-4-02325)

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DEPARTMENT OF THE ARMY
RECORD OF DECISION
FOR
SEATTLE, PORT OF
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Reference: Seattle, Port of - 1996-4-02325

Concerning issuance of a Department of the Army permit under Section 404 of the Clean Water Act (33 USC §1344).

1. Introduction. This permit decision document constitutes the Record of Decision (ROD) for the work described in the public notices dated 19 December 1997, 30 September 1999, and 27 December 2000, which are hereby incorporated by reference. This ROD includes this document, the Index of Comments Received Throughout the Permit Review Process (Appendix A), the Section 404(b)(1) Evaluation (Appendix B), and the Functional Assessment, Impact, and Mitigation Plan Review (Appendix C). Section 10 of this ROD contains the comments and responses to the large number of issues raised concerning the proposed work.

My decision is to issue a permit with special conditions for the proposed work. I have determined the applicant, Port of Seattle (Port), has provided sufficient information to demonstrate a need for the proposed project, compliance with the applicable Federal laws, and that issuance of a permit is not contrary to the public interest. The Port has obtained the required Section 401 Water Quality Certification (WQC) (33 USC §1341).[1] I have added special conditions to the permit to ensure compliance with the finding of my decision (see Paragraph 12(M) below).

2. Description of Work. The Port proposes to place fill in wetlands, streams, and jurisdictional drainage channels for construction at the Seattle-Tacoma International Airport (STIA). The work proposed is part of the proposed Master Plan Update (MPU) and includes the construction of an 8,500 foot third runway, two Runway Safety Areas (RSA), the South Aviation Support Area (SASA), the mitigation both on-site and at Auburn, the relocation of South 154th/156th Way, the discharge of fill material in Borrow Area 1 and the upgrade of an existing gravel haul road (located northeast of Borrow Area 4). The construction involves permanently impacting wetlands on and off-site totaling 19.62 acres and temporarily impacting wetlands totaling 5.51 acres on-site and 23.27 acres at Auburn[2]. Up to 980 linear feet of Miller Creek will be filled and relocated. Drainage channels in the Miller Creek basin (1,290 linear feet) and in the Des Moines

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[1] A discussion of the status of the WQC is found in Section 7(J).

[2] This distribution of the impact acreages between permanent and temporary are slightly different than reported in the final public notice dated 17 January 2001. See Paragraph 6 in Appendix C for details.

Creek basin (100 linear feet) will also be impacted. A breakdown of the impacts for each project component can be found in Table 1.

Table 1. Summary of on and off-site permanent and temporary impacts

	Wetlands (acres)		Stream (LF)	Drainage Channels (LF)
	Permanent	Temporary		
Third Runway[a]	15.48	4.94	980	1,390
RSA	0.14	0.40		
SASA	2.78	0.17		
Borrow Area 1 and haul road	1.10	0		
Auburn mitigation	0.12	23.27		
Total	19.62	28.78	980	1,390

[a] Includes relocation of S 154th/156th Way and temporary mitigation impacts

Work also proposed in the MPU, but not within the U.S. Army Corps of Engineers (Corps) jurisdiction includes, but is not limited to, extending Runway 34R to the south, improving and expanding the main terminal and access system, constructing a new air traffic control tower, developing new and expanding existing parking facilities, relocation, redevelopment and expansion of support facilities, and developing a new north unit terminal, roadway system, and parking facility. Several of these projects have been put on hold as a result of the events of September 11th.

3. Location. The project is located at the STIA at SeaTac, Washington, with the exception of a portion of the proposed mitigation, which is located at Auburn, Washington. The proposed 8,500 foot Third Runway is to be located parallel to and west of the two existing runways. There will be 1,000 feet separating 16X/34X and 16R/34L (the middle runway) and a 2,500-foot separation from 16L/34R (the east runway). The improvements to the RSAs are located on the north end of the two existing runways. The SASA is to be located to the southeast of the existing runways. The borrow areas are located to the south of the airport between South 196th Street and South 216th Street. The project is located in Sections 20, 21, 28, 29, 32, and 33 of Township 23N, Range 4E and Sections 4 and 5 of Township 22N, Range 4E of the Des Moines 7.5' quad.

The proposed off-site mitigation at Auburn, Washington, is located between Auburn Way North and the Green River and south of S 277th Street. The site is located in Section 31 of Township 22N, Range 5E of the Auburn 7.5' quad.

4. The Relative Extent of Public and Private Need for the Proposed Work. The Port began construction of the STIA in 1943 to relieve the overcrowding at Boeing Field, the regional commercial airport existing at that time. The Port was asked to construct the airport at the request of regional and local officials and business organizations. The airport started with four runways, the main one running north/south and the other three being crosswind runways. Changes over the next 3 decades included improvements to

the passenger terminals, improvements to the main runway to accommodate jet airplanes, and the completion of the second parallel runway in 1973. STIA has developed to become the primary commercial airport for the Pacific Northwest and is the only airport to provide primary scheduled commercial air carrier service in King, Pierce, Snohomish, and Kitsap counties.

In the mid to late 1980's, various studies completed by the Port, the Federal Aviation Administration (FAA), and the Puget Sound Regional Council (PSRC) [formally known as the Puget Sound Council of Governments], all determined the existing runways at STIA would not be adequate to meet the regional air travel needs beyond the year 2000. Based on these studies, the Puget Sound Air Transportation Committee (PSATC) was created to study possible regional options. The Port, FAA, and PSRC sponsored the PSATC. The PSATC's recommendation was to create a multiple airport system that included a new runway at STIA. In 1992, the Port passed a resolution adopting PSATC's recommendation to construct a third runway. They also state the remainder of the regional solution needs to be further examined. Another study was undertaken to determine the feasibility of a major supplemental airport. In 1994 the PSRC Executive Board determined there were no feasible sites for a major supplemental airport, no further studies should be undertaken, and provided all the permits are obtained, the third runway at STIA should be constructed.

5. Purpose of Work. The project purpose is to meet the public need for an efficient regional air transportation facility to meet anticipated future demand. The purpose is also described in the original, first, and second revised public notices and remains the existing purpose of record for this application. The Port proposes to accomplish the project purpose by implementing specific measures at STIA which are summarized as follows:

- **Third Runway.** *Improve the poor weather airfield operating capability to accommodate aircraft activity with reduced delay in aircraft takeoffs and landings.* As aircraft operations at SeaTac have increased over the years, aircraft delay, particularly during poor weather conditions, has worsened. Recent forecasts predict continued increases in aircraft operations and continued worsening of aircraft delay during poor weather conditions.[3] A third runway would allow SeaTac to operate two runways for landing during times of poor weather.

- ***Runway Safety Areas (RSAs).*** *Provide RSAs that meet current Federal Aviation Administration (FAA) standards.* An RSA is the ground surface surrounding a runway suitable for reducing the risk of injury/damage in the event that an airplane undershoots, overshoots, or veers off the runway. The RSAs on the two existing runways at SeaTac do not meet current FAA standards.

[3] Recent economic conditions and the events of September 11th have affected the growth in aircraft operations and passenger activity. However, the FAA confirmed the "operational levels nationwide are expected to return to pre-September 11th levels sometime in 2003 or 2004" (see Paragraph 10(A)(9) below and Appendix B for additional discussion).

- **South Aviation Support Area (SASA).** *Develop an additional South Aviation Support Area* (SASA) *to accommodate aircraft maintenance facilities and air cargo facilities.* Expansion of main air terminal Concourse A and development of the new North Terminal would displace existing maintenance and air cargo facilities. These terminal facilities are required to accommodate projected passenger demand.

6. Alternatives. A comprehensive discussion of alternatives available to the Port is contained in Paragraphs 3 and 4 of Appendix B (Section 404(b)(1) Evaluation) of this ROD.

Three alternatives exist for the Corps: to issue the permit as proposed by the Port, to issue the permit with special conditions, or to deny the permit. Each alternative is discussed below:

A. Permit Issuance. This is the alternative preferred by the Port. The Corps received letters indicating concern with aspects of the Port's proposal, including letters from the Muckleshoot Tribe, the U.S. Environmental Protection Agency (EPA), the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (USFWS). The Tribal and Federal agencies requested further information and clarification regarding the project (see Paragraphs 10(B) and 10(C) below respectively). The Section 404(b)(1) Evaluation (Appendix B) concluded the Port clearly demonstrated there were no less environmentally damaging practicable alternatives available to achieve the project purpose. However, I have determined special conditions are necessary to comply and the 404(b)(1) Guidelines and for the proposed project not to be contrary to the general public interest (see Paragraph 12(M) below).

B. Permit Issuance with Special Conditions. As stated above, I have determined that special conditions are necessary for the proposed project. These are listed in Paragraph 12(M) below. With the inclusion of the special conditions, I find the alternative of permit issuance with special conditions is in compliance with the 404(b)(1) Guidelines and is not contrary to the general public interest.

C. Permit Denial. Over 500 private citizens, organizations, and business groups requested denial of the permit for reasons discussed in Paragraph 10(A)(1). I have thoroughly reviewed and analyzed the concerns presented by the interested public. I have concluded this work will not have significant adverse effect on these public interest factors. The proposed work is considered not to be contrary to the general public interest.

7. Statutory Authorities and Administrative Determinations Applicable to Proposed Project.

A. National Environmental Policy Act (NEPA). The FAA was the Federal lead for the environmental impact statement (EIS) process. A Final Environmental Impact Statement (FEIS) dated January 1996 was prepared pursuant to the Council on Environmental Quality Regulations (40 CFR Parts 1500-1508). A Final Supplemental

Environmental Impact Statement (FSEIS) dated May 1997 was also prepared. The Corps was a cooperating agency for both the FEIS and FSEIS. The FAA finalized their ROD on 3 July 1997. On 8 August 2001 the FAA issued a revised ROD to validate the data and analysis contained in the FEIS and FSEIS. The Corps is adopting the findings of the FEIS and FSEIS and has prepared this ROD in conjunction with these documents. The Corps has determined these documents are reasonable and complete and are hereby incorporated by reference. Public concerns regarding the adequacy of these documents are addressed in Paragraph 10(A)(8) below.

B. Clean Water Act – Section 404. A Clean Water Act (CWA) Section 404 permit is required for the discharge of dredged or fill material into waters of the United States, including wetlands. Landclearing and some excavation activities are also considered a discharge regulated under Section 404. The proposed project includes permanently impacting 19.62 acres of wetlands, 980 linear feet of Miller Creek, and 1,390 linear feet of drainage channels. An additional 28.78 acres of wetlands will be temporarily impacted. The Port has demonstrated the proposed project is the least environmentally damaging practicable alternative available to the Port for achieving the project purpose. Appendix B to this ROD contains the Section 404(b)(1) Evaluation.

C. Clean Air Act. The Clean Air Act (CAA) required the Environmental Protection Agency (EPA) to promulgate rules to ensure Federal actions conform to the appropriate State Implementation Plan (SIP). Conformity to a SIP is defined as meeting conformity to a SIP's purpose of eliminating or reducing the severity and number of violations of the National Ambient Air Quality Standards (NAAQS) and achieving expeditious attainment of such standards. The EPA has issued rules for determining general conformity of airport related projects (40 CFR Part 93, Subpart B). State and local air agencies are provided notification and their expertise consulted.

The FAA determined the project would meet the *de minimis* thresholds for maintenance areas as described in 40 CFR 93.153(b)(2). Therefore, an air conformity analysis was not required. However, because of the size and visibility of the project, the FAA voluntarily performed a conformity analysis as documented in the FSEIS. Their conclusion confirmed the project is below the *de minimis* levels and would conform with the applicable SIP if a conformity determination were to be required. In a letter dated 23 June 1997, the EPA determined the "*de minimis* thresholds have not been exceeded for general conformity under the CAA." The Puget Sound Air Pollution Control Agency (PSAPCA) made a similar determination on 23 June 1997, as did Washington State Department of Ecology on 20 December 1996 with a reaffirmation on 25 June 1997. Governor Gary Locke issued the State certification required under 49 U.S.C. §47101 et seq. on 30 June 1997.

The Corps has reviewed the FAA's air pollution analysis presented in the NEPA documentation, including the responses to comments, the comments made during the Corps process, and the ROD and did not find any reason to disagree with the FAA's determinations. See Paragraphs 9(T)(4) and 10(A)(10)(a) below for additional discussion.

D. National Historic Preservation Act. The National Historic Preservation Act (NHPA) requires Federal agencies to consider the effect of its actions on historic properties. Requirements of Section 106 of the Act apply to any Federal undertaking, funding, license, or permit. The Washington Office of Archaeology and Historic Preservation is consulted when projects are subject to review under Section 106 of the NHPA. The FAA is the Federal lead for the Section 106 consultation. Both listed and potential sites are located within the MPU area. On 14 April 1997, the FAA initiated consultation with the Advisory Council on Historic Preservation and the State Historic Preservation Officer regarding Sunnydale School. Consultation was completed regarding monitoring of sites potentially containing archaeological or historic material by a letter dated 24 July 2001. See Paragraph 9(D) below for additional discussion.

E. Endangered Species Act. Section 7 of the Endangered Species Act (ESA) requires Federal agencies to ensure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of habitat of such species which has been designated as critical. Through informal and formal consultation procedures with the U.S. Fish and Wildlife Service (USFWS) and/or National Marine Fisheries Service (NMFS) (the Services), the Federal agency must evaluate information on the presence of listed species (including timing and life stages), habitat for such species and their prey sources, and other parameters. ESA species in the project area include bald eagles, marbled murrelet, Coastal/Puget Sound bull trout, and Puget Sound chinook. Critical habitat is designated for marbled murrelet but does not exist within the project area. Chinook critical habitat was designated and present in the project area at the beginning of the consultation process. However, in May 2002 critical habitat for many of the fish runs, including Puget Sound chinook, was withdrawn by NMFS.

As the Federal lead, the FAA forwarded a copy of a Biological Assessment (BA) (Port of Seattle, 2000b) and a supplemental BA (Port of Seattle, 2000c) to the Services to complete the necessary consultation. A determination of "not likely to adversely affect" was made for all ESA species as well as critical habitat for chinook. This BA covers the regulatory actions for both the FAA and the Corps. A letter of concurrence was received from NMFS on 31 May 2001 and a biological opinion was received from USFWS on 22 May 2001. Conservation recommendations were proposed by the Services. See Paragraph 9(I)(1) for more details regarding ESA determinations and coordination.

F. Essential Fish Habitat. The Magnuson-Stevens Fisheries Conservation and Management Act, as amended by the Sustainable Fisheries Act of 1996, requires Federal agencies to consult with NMFS on activities that may adversely affect Essential Fish Habitat (EFH). EFH means those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity. EFH of concern in the project area include Pacific Coast salmon (chinook, coho, and pink), Coastal Pelagic Fishery species, and West Coast groundfish.

As the Federal lead, the FAA forwarded an EFH analysis in the BA (for the pelagic and ground fish) and in a supplemental document for the salmon. This analysis covers the regulatory actions for both the FAA and the Corps. A determination of "not likely to adversely affect" was made for the pelagic and ground fish and "no adverse effect" for the coho salmon. A determination of "no effect" was made for the chinook and pink salmon. A letter of concurrence was received from NMFS on 31 May 2001 for the pelagic and ground fish and 9 August 2001 for the salmon. Conservation recommendations were not proposed by NMFS. See Paragraph 9(I)(2) below for more details regarding EFH determinations and coordination.

G. Executive Order 11988 – Floodplain Management. Executive Order (EO) 11988 on Floodplain Management was issued on 24 May 1977. The EO requires Federal agencies to avoid, to the extent possible, development in the 100-year floodplain unless it is the only practicable alternative, reduces the hazard and risk associated with floods, minimizes the impacts of floods on human safety, health, and welfare, and restores and preserves the natural and beneficial values of the floodplain. The Corps' decision as documented in this ROD complies with this EO. See Paragraph 9(K) below for more details regarding floodplain management.

H. Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority and Low-Income Populations. This EO is designed to focus Federal attention on the environmental and human health conditions in minority and low-income communities with the goal of achieving environmental justice. The concept of environmental justice is based on the findings that a disproportionate number of obnoxious and/or potentially contaminating facilities/industries are located in minority communities or in low-income communities. The Department of Defense (DoD) issued a report titled *Strategy on Environmental Justice* on 24 May 1995 outlining how DoD will implement the EO. The strategy focused on promoting enforcement of all health and environmental statutes, ensuring greater public participation, improving research and data collection, and identifying differential patterns of consumption of natural resources. The Corps' decision as documented in this ROD complies with this EO. See Paragraph 9(I)(3) below for more details regarding environmental justice.

I. FAA Review. The FAA is responsible for determining project eligibility for Federal grant-in-aid funds (49 USC 47101, et. seq.), Passenger Facility Charge funds (49 USC 40117), approval for relocation/upgrade of the existing airport traffic control tower and various navigational aids (49 USC 44502(a)(1)), development of air traffic control and airspace management procedures (49 USC 40103(b)), determination regarding obstructions to navigable airspace (49 USC 40103(b) and 40113), determination regarding proposal from an airspace prospective (49 USC 40113(a)), determinations pertaining to FAA funding of airport development (49 USC 47106 and 47107), a certification that the proposed facility is reasonably necessary for use in air commerce (49 USC 44502(b)), and protection of U.S. Department of Transportation Section 4(f) resources (49 USC 330(c)). In the ROD dated 3 July 1997, the FAA determined the proposed project was in compliance with these laws. On

8 August 2001 the FAA issued a revised ROD to validate the data and analysis contained in the FEIS and FSEIS.

J. Water Quality Certification. Prior to the issuance of a Section 404 permit (33 USC §1344), the Washington State Department of Ecology (Ecology) must either issue a Section 401 WQC (33 USC §1341) stating that the Section 404 action will comply with the applicable provisions of 33 USC Sections 1311, 1312, 1316, and 1317, or waive the requirement. The State had 1-year to make this determination, in this case until 17 January 2002.[4] The Corps public notice, with the WQC notification included, is the date from which the year period runs and the Corps' public notice was dated 17 January 2001.

Ecology issued a conditional WQC on 10 August 2001. On 21 September 2001 they issued a revised WQC. Compliance with this WQC is a general condition of this permit.[5] The Airport Communities Coalition (ACC) appealed the WQC decision to the Washington State Pollution Control Hearings Board (PCHB) and the PCHB "stayed" the water quality certification on 17 December 2001. However, the WQC was not voided by a State or Federal court prior to 17 January 2002, the 1-year period from the date of WQC application. Therefore, consistent with Regulatory Guidance Letter (RGL) 87-03, the WQC is considered to be valid. If the WQC is voided or modified after the 1-year period, "the district engineer may consider if a modification, suspension, or revocation might be appropriate in accordance with 33 CFR 325.7" (see Paragraph 2(c) in RGL 87-03).[6] Though the Corps does not consider a "stay" to be the same as "voiding" and does not consider an administrative appeal equivalent to a court, if the PCHB stay were to act as "voiding" the WQC, the 1-year waiver period for the WQC has run.

The PCHB issued their Findings, Conclusions and Order on 12 August 2002. In their decision they lifted the stay previously placed and determined "Ecology's issuance of the §401 certification, with the imposition of the conditions in the §401 certification and with the conditions imposed by this Board, provide reasonable assurance that state water quality standards will be met." The Board added 16 conditions to the WQC but did not remand the WQC back to Ecology to revise the WQC. Under RGL 87-03, the District Engineer is not required to incorporate changes by the State after the 1-year waiver period. The Corps has reviewed the PCHB decision and has incorporated those conditions it believes are necessary to meet the Corps' Section 404 regulatory

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[4] If the State, interstate agency, or Administrator, as the case may be, 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 with respect to such Federal application (33 USC 1341(1)(a)).

[5] Section 401(d) requires that appropriate requirements of a WQC "become a condition of any Federal license or permit subject to the provisions of this section." (33 USC 1341(d))

[6] RGLs are sequentially numbered and expire on a specified date. However, unless superseded by specific provisions of subsequently issued regulations or RGLs, the guidance provided in RGLs generally remains valid after the expiration date (*Federal Register*, Vol. 64, No. 54, Monday, March 22, 1999, Supplementary Information). RGL 87-03 has not been superseded and therefore, the guidance is still valid.

requirements. On 6 September 2002 the Port appealed the PCHB's decision to the Superior Court of King County. Ecology and ACC have also filed appeals. As of the date of this ROD, the appeals are still pending. The Corps' decision regarding the PCHB conditions does not obviate the Port's need to comply with State and local requirements.[7]

K. Coastal Zone Management Act. Pursuant to the requirements of Section 307(c)(3) of the Coastal Zone Management Act of 1972 as amended, the project must comply with the approved Washington Coastal Zone Management (CZM) Program. This concurrence is based upon compliance with all applicable enforceable policies of the CZM Program, including Section 401 of the CWA. The Washington State Department of Ecology issued the CZM Consistency Certification for this project on 10 August 2001. On 21 September 2001 they issued a revised certification.

L. National Pollutant Discharge Elimination System (NPDES) Permit. Under Section 402 of the Clean Water Act, the EPA delegated authority to Ecology for the regulation of discharges of pollutants into the State's surface waters. Ecology issued NPDES Stormwater Permit No. WA-002465 on 20 February 1998 as modified on 29 May 2001. A NPDES General Stormwater Permit for Construction Activities No. S03-00491 was issued on 4 April 2001.

M. Hydraulic Project Approval. Chapter 220-110 of the Washington Administrative Code, Hydraulic Code Rules, establishes criteria that the Washington Department of Fish and Wildlife (WDFW) has developed for the protection of fish life. These criteria are used for the review of hydraulic projects and the conditioning of Hydraulic Project Approvals (HPA). HPAs have been received for the installation of stormwater facilities and outfalls for the SR 309 Temporary Interchange, temporary water discharge for the Auburn mitigation site dewatering, the Miller Creek Basin Relocation Project (including the removal of the bulkhead at Lora Lake and the 156th Street Bridge replacement), the SR 509 Temporary Interchange, construction stormwater facilities for the Airport Surveillance Radar-9 (ASR) site, and soil sampling and installation of groundwater monitoring wells. The applications for HPAs are still pending for the Wetland A17 culvert removal and Water D routing and the in-stream mitigation work at the Des Moines Way Nursery site.

N. Forest Practices Act. Title 76 of the Revised Code of Washington (RCW) requires applicants to obtain a permit to comply with the Forest Practices Act. Before starting construction each year, the Port obtains the yearly permit for the work to be completed in the construction season and/or extensions on existing permits. At this time they have permits for the Logistics Site and a portion of the embankment area, and Borrow Areas 3 and 4.

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[7] ACC in their 13 and 22 November 2002 letters state the Corps is required to incorporate all the PCHB conditions into the DA permit citing among other cases *American Rivers*, 129 F.3d at 107-111. We disagree with ACC's assessment and that our approach is consistent with Section 401, Corps guidance, and applicable case law.

O. Port of Seattle Review. The Port issues to themselves the permits for the comprehensive planning and zoning process, clearing and grading, floodplain filling, demolition and others. These permits are issued once the 100% plans are available.

8. Relevant Background of Corps Involvement. For the preparation of the EIS for the MPU at STIA, the Corps agreed to be a cooperating agency under NEPA with the FAA.[8] The draft EIS was published in April 1995 with the FEIS published in February 1996. A draft supplemental EIS was issued in February 1997 with the FSEIS issued on May 1997. The MPU is a comprehensive analysis of long-term needs for the STIA and the regional transportation network in general. A range of alternatives were addressed in the EIS, including alternative modes of transportation, construction of a new airport or modifications to an existing airport, improvements in systems management, development alternatives at STIA, and no action. After review of the alternative courses of action to address poor weather aircraft operating delay, the FAA, the PSRC, and the Port concluded the only practicable course of action to achieve the project purpose was to construct a third parallel air carrier runway and other air transportation facilities at STIA. The FAA and the Port also concluded it is necessary to construct extensions of the RSAs to bring the runways into compliance with FAA standards and it is necessary to construct the SASA. The FAA completed their ROD on 3 July 1997, with a revised ROD issued on 8 August 2001.

On 16 March 1995, the Corps received a preliminary application from the Port (1995-4-00461) to confirm the wetland boundaries within the proposed MPU expansion area. Only portions of the wetlands were actually delineated because the consultants could not gain access to the wetland areas on private property prior to acquisition by the Port. Therefore, the Corps only verified the boundaries for a portion of the wetlands. However, the Corps did agree to go to public notice with an estimate for the remaining wetlands. On 20 March 1996 a pre-application meeting was held at the Corps' office in Seattle with Federal, State, and local agencies present. In the meeting, the proposed Third Runway, SASA, and mitigation site in Auburn were discussed.

On 19 December 1996, the Corps received a more complete permit application (1996-4-02325) for the placement of fill for the construction of the third runway, RSA improvements, and SASA. On 19 December 1997 a public notice was issued and impacts were estimated to be 11.42 acres of wetlands filled and rechanneling of 980 feet of Miller Creek, 2,280 feet of drainage channels in the Miller Creek basin, and 2,200 feet of Des Moines Creek. A wetland mitigation plan was included with this

[8] There are a number of upgrades and improvements proposed as part of the MPU not requiring a Department of the Army permit under Section 404 of the Clean Water Act. These projects include, but are not limited to, extending Runway 34R to the south, improving and expanding the main terminal and access system, constructing a new air traffic control tower, developing new and expanding existing parking facilities, relocation, redevelopment and expansion of support facilities, and developing a new north unit terminal, roadway system, and parking facility. However, future phases of the work will require the placement of fill in wetlands and other waters of the United States so a permit will be required when those projects are ultimately proposed.

proposal. On 9 April 1998 a joint public hearing sponsored by the Corps and Ecology was held to gather more input from the public.

After reviewing the comments received and development of more detailed designs, the Port made some changes to the MPU projects. One major change was the Port gained access to most of the wetlands and one waterway within the proposed project area. Delineations were completed and then confirmed by the Corps. As a result, the wetlands impacts increased from the 11.42 acres to 18.33 acres, the drainage channel impacts were reduced from 4,480 linear feet to 1,390 linear feet, and the direct impact to 2,200 feet of Des Moines Creek was eliminated. The amount of fill required was also reduced because of the inclusion of a large retaining wall at the embankment mid-section along Miller Creek. As the potential impacts changed, the proposed mitigation was modified to include the addition of in-stream fisheries enhancement work in Miller Creek, increased riparian buffers, restoration of farmed wetlands, and overall expansion of the areas to be restored and/or enhanced. Another change included the excavation of new floodplain areas to compensate for filled floodplain areas. On 30 September 1999, the Corps issued a revised public notice documenting these changes. A second public hearing was then held on 3 November 1999.

Many comments were received as a result of the second public notice and public hearing. Over the next year and continuing until the permit decision was made, the Port worked with the Corps and Ecology to gather the necessary information to address the issues raised during the comment period. Because of the length of time it took to gather the information, Ecology determined they could not make a decision regarding the WQC within the required 1 year from issuance of the public notice. Therefore, on 29 September 2000, the Port withdrew their request for a Section 404 permit from the Corps. Consequently, the WQC was no longer needed.

On 27 October 2000, the Port resubmitted an application for the placement of fill for the construction of the third runway, RSA improvements, and SASA. A third public notice was issued on 27 December 2000 including an announcement for a public hearing on 26 and 27 January 2001. Revision to the proposal since the second public notice was issued included additional mitigation acreage at the Auburn site, design revisions to the in-stream work in Miller Creek, and slight modifications to the wetland impact acreage. The revisions were a result of addressing many of the issues previously raised.

Coordination with the Port and others continued throughout the decision making process to insure all of the issues raised within and after all the public comment periods expired were addressed. This included several meetings with the opposition groups, the Airport Communities Coalition (ACC) and the Regional Commission of Airport Affairs (RCAA).

9. Impact Evaluation. The Corps has evaluated both the individual and cumulative impacts of the proposed work. The evaluation considered relevant factors including, but not limited to, conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards,

floodplain values, clean air, noise, land use, shoreline erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership, and, in general, the needs and welfare of the people (see 33 CFR 320.4).

A. Effect on Wetlands (33 CFR 320.4(b)).

(1) Impacts. The proposed project will permanently impact 19.62 acres and temporarily impact 28.78 acres of wetlands for the entire project, including the proposed off-site mitigation at Auburn.[9] Appendix C describes the wetlands (Enclosure A), the functions (Paragraph 5 and Enclosure B), and the impacts (Paragraph 6, Enclosure C, and Table 1) in detail. Below is a summary describing the wetlands to be impacts, the functions these wetlands perform, and the potential impacts of the proposed project.

The wetlands to be impacted by the proposed project include forested, scrub/shrub, emergent, and open water areas with several of the wetlands containing at least two different vegetation classes. In the forested areas, there are many individual trees over 60 – 80 years but the majority average 20 – 40 years of age. The emergent wetlands include some farmed wetlands and wetlands within the fairways of the golf course. Using Ecology's wetland rating system, the majority of the wetlands being permanently impacted are Category III wetlands (61%), with 23% being Category II, and 16% Category IV. None of these wetlands are unique in nature for the Puget Sound region.

The functions supported by the wetlands include water quality (sediment, nutrient, heavy metal, toxic, and organics removal), hydrology (reduction of peak flows, decreasing erosion, groundwater recharge and discharge), and general habitat suitability (fish and amphibian habitat, aquatic food web conditions, invertebrate habitat, terrestrial bird, waterfowl, and other wildlife habitat, and native species richness). For water quality, the Corps has determined the majority of the wetlands are rated high given the existing land uses, the landscape position of the wetlands, and the limited number of water quality treatment ponds within the area. The Corps has determined there is a range of ratings for the hydrology functions. The depressional wetlands provide reduction of storm peak flows at relatively high levels and prevent downstream erosion in the area streams. The slope wetlands perform this suite of functions at a low level. The small wetlands perform them at an even lower level given the limited opportunity and capacity for storage. As for habitat functions, the Corps has determined the on-site wetlands, in general, rate highest for carbon export and food chain support and to a lesser extent invertebrate, passerine bird, small mammal, and amphibian habitat. The Auburn wetlands rate as low overall for habitat support.

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[9] The PCHB and Ecology have the permanent impacts as 21.34 acres and the temporary as 2.05 acres. The PCHB/Ecology permanent impacts include 0.92 of an acre of prior converted croplands not regulated by the Corps. The Corps considered part of the 2.05 acres of temporary impacts as permanent (see Table 2 of Appendix C). As shown in Table 1 above, the Corps also included temporary impacts associated with the construction of the mitigation, 4.71 acres on-site and 23.27 acres off-site which the PCHB/Ecology did not include.

The Corps analyzed permanent, temporary, temporal, indirect, and cumulative impacts as a result of the proposed projects. A discussion of cumulative impacts can be found in Paragraph 9(S) below. As stated above, there will be 19.62 acres of permanent impacts and 28.78 acres of temporary impacts. Regarding water quality, potential permanent impacts include decreased opportunity for nutrient and sediment trapping, decreased opportunity to detain, retain, and filter stormwater, and increased pollutant and sediment loads to streams. Temporary impacts could occur during construction as a result of soil movement and disturbance. Temporal impacts will occur until the vegetation communities become reestablished and are able to perform their water quality functions. Indirect impacts could include a shift in food chain support due to any changes in water quality. Additional discussion regarding water quality can be found in Paragraph 9(C) below.

The proposed project will permanently change the pathways for water movement within the project area. Other potential long-term impacts include an increased magnitude, frequency, and duration in peak flow, increased erosion and sedimentation, and base and low flow impacts. Temporal impact will occur until the vegetation communities mature and stabilize so they can perform storm and floodwater resynchronization functions. Potential indirect impacts include changes to the vegetation community and wildlife use of the wetlands or habitat damage to streams either through erosion or reducing wetted areas if the hydroperiods are substantially changed.

There will be a permanent loss of habitat in the areas being filled by the proposed project. This loss could alter or eliminate populations in the lower trophic levels, reduce the volume of organic particulate matter, eliminate or reduce wildlife migration corridors, etc. Temporary impacts could include disruption to wildlife utilizing adjacent areas and trimming of vegetation in shrub and forested wetlands for silt fence installation. Temporal impacts occurring include the reduction of habitat and carbon export until the vegetation is reestablished in the newly planted areas. Indirect impacts include the potential shift in food chain support functions.

(2) Mitigation. The Port has proposed mitigation to offset the potential physical, chemical, and biological impacts to wetlands and the species supported by the wetlands, as documented in the *Natural Resource Mitigation Plan* (NRMP) (Port of Seattle, 2001d),[10] *Comprehensive Stormwater Management Plan* (Port of Seattle, 2000d), *Low Streamflow Analysis* (Port of Seattle, 2001a), and the *Wildlife Hazard Management Plan* (WHMP) (Port of Seattle, 2000e). A more detailed discussion of the compensatory mitigation can be found in Paragraph 10(A)(5) below and Appendix C. Additional discussion regarding stormwater and low flow can be found in Paragraphs 9(C) and 10(A)(6)(a) and (b) below. Discussion about wildlife concerns can be found in Paragraphs 9(B) and 10(A)(10)(g) below.

[10] The NRMP referenced throughout the ROD and Appendix B is the November 2001 version with corrections dated January 2002 and February 2002 (miscellaneous text and figures) and 15 November 2002 (revised restrictive covenants). Appendix C includes a review of both the December 2000 and November 2001, as amended, versions.

In summary, the NRMP describes the compensatory mitigation voluntarily proposed by the Port to replace wetland and stream functions impacted by the proposal. The proposed mitigation includes wetland creation, restoration, and enhancement activities, stream enhancement in Miller Creek, riparian buffer enhancement in Miller and Des Moines creeks, replacement of drainage channels in the Miller Creek basin, and wetland restoration and enhancement at an off-site mitigation area in Auburn. Appendix C describes the adequacy of the NRMP in Paragraphs 7 through 10. The *Stormwater Management Plan* addresses water quality and quantity impacts through the construction of detention ponds and vaults, implementation of treatment best management practices (BMPs) for new development, redevelopment, and retrofitted areas, and numerous actions to address water quality issues. The *Low Streamflow Analysis* addresses the potential low flow impacts through the construction of supplemental vaults so water can be released during the summer and early fall months to augment streamflow. The WHMP emphasizes the identification and abatement of wildlife hazards within the airfield environment, including the wetlands.

The PCHB also had concerns regarding the proposed wetland mitigation and 3 of the 16 conditions they added were regarding wetland mitigation.[11] A discussion of each of these conditions is as follows.

Condition 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 or flowing water, wetland resources, and wetland functions. In Condition D, the WQC requires the Port to complete the mitigation and monitoring as stated in the NRMP and with a more specific condition requiring "groundwater within the upper 10 inches from at least March to mid-April in years of normal rainfall." The PCHB was also concerned over maintaining the same, pre-construction, amount of wetland hydrology during the driest months (August through October) of the year. Therefore, they added this condition requiring the pre and post construction hydroperiods of the wetlands to match. This condition would help to ensure the wetland characteristics such as standing or flowing water, wetland resources, and wetland functions are maintained in the remaining wetlands.

Condition 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. The WQC approved the proposed mitigation that included, but is not limited to, credit for off-site mitigation at Auburn, wetland and riparian buffer enhancement, and wetland and buffer preservation. Ecology used their own guidance and factored in both functions and acreage in determining the

[11] The Port is appealing Condition 11. If their appeal changes the PCHB decision, then the DE has the option of modifying, suspending, or revoking the DA permit to comply with the revised decision (see Paragraph 7(J) above).

appropriate ratios for the mitigation for the WQC. The PCHB believed credits should not be granted for the wetland and upland buffers and the wetland and upland preservation because they cannot substitute replacement of actual wetland losses. They stated, "wetland impacts must be mitigated with restored, enhanced or created wetlands, not with buffers."[12] The PCHB is also requiring credit for the off-site mitigation not be given until on-site mitigation efforts reach a 2:1 ratio or opportunities are exhausted. This will encourage the Port to examine previously overlooked in-basin mitigation opportunities.

The Port is appealing this decision because on-site mitigation opportunities are limited because of FAA safety regulations and state statute allows off-site mitigation. They also believe the PCHB should have allowed credit to be given for the wetland and upland buffers and the wetland and buffer preservation efforts. ACC is not challenging the condition but does not agree with allowing out-of-basin mitigation, counting Vacca farms as restoration, accepting the Port's functional assessment, and the statement that the proposed mitigation would be beneficial in removing pollutants.

Condition 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. The wording of Condition (D)(1)(h) in the WQC requires wetland delineations be performed at intervals of 5, 10, and 15 years. If the delineations show the boundaries have decreased, additional mitigation may be required. The PCHB condition changes the 'may' to 'shall'.

(3) Findings. 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. I have also determined it is in the public interest to require the completion of mitigation as a special condition of the issued Department of the Army permit (see Paragraph 10(A)(5) below for additional discussion).

Regarding PCHB Condition 10 (Wetland hydroperiod), maintaining the wetland hydroperiod is an important component in ensuring the remaining wetlands are not adversely impacted. However, assessing the hydroperiod for wetlands is just one factor in determining the overall function of a wetland. I have completed an independent analysis of the adequacy of the mitigation, including the performance standards and monitoring related to hydrologic conditions, to ensure the overall function of the wetlands are maintained. Appendix C documents this analysis and includes the Corps'

[12] PCHB 01-160. Final Findings of Fact and Conclusions of Law, page 80, lines 2-3.

functional assessment. The Port has also provided more detailed protocols regarding groundwater monitoring (Port of Seattle, 2002) and I have added a special condition to ensure these protocols are implemented (see Paragraphs 10(A)(10)(h) and 12(M) below). I have determined the proposed mitigation plan is reasonable and specifically designed for this project site to functionally compensate for the loss of wetlands. This condition has not been added to the permit.

Regarding PCHB Condition 11(Mitigation ratios and credits), I have completed an independent analysis of the adequacy of the mitigation and have determined the proposed mitigation plan is reasonable and specifically designed for this project site to compensate for the loss of wetlands. The Corps does not require applicants to follow any particular functional assessment methodology. Therefore, in making this determination, I relied on a Corps completed functional assessment (see Appendix C for details). I also based my decision on functional replacement rather than acreage to meet the program goal of no net loss of functions and values. Regarding the use of functional replacement rather than acreage, the 1990 Memorandum of Agreement between the Corps and EPA concerning mitigation states:

> The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable, and thus may not be relevant in all cases, as discussed in Section II.B of this MOA. In the absence of more definitive information on the functions and values of specific wetlands sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. (Corps, 1990, Part III.B., page 5)

As the Port did provide detailed information regarding functions and I performed an independent functional assessment, a determination of the adequacy of the mitigation on a functional basis is appropriate. As documented in Appendix C, I gave partial credit for both the wetland and upland buffers and the work in and around Lora Lake as they do contribute to the overall functionality of the proposed mitigation. I also gave credit for restoring the wetlands at Vacca Farms.[13] I also factored in the avoidance of wetlands and buffer impacts in Borrow Area 3 in my impact evaluation. I also examined several potential on-site alternatives for mitigation and the Port did subsequently augment the NRMP by including additional mitigation around Lora Lake and at the Des Moines Nursery. The primary impact to Walker Creek, potential low flow impacts, have been mitigated with the proposed low flow mitigation (See Paragraph 9(C) below). I

[13] As discussed on page 82 of the PCHB decision, "[t]here is no hard line distinguishing restoration from enhancement." The Corps considered the work restoration only because most of the Vacca Farm area is not a jurisdictional wetland. As the adequacy of the mitigation was made on a functional basis and the proposed mitigation at Vacca Farms is increasing the functions (however, degraded and/or missing), using either the term restoration or enhancement is immaterial.

have determined the final mitigation plan proposed by the Port is adequate to compensate for the impacts of the project on the aquatic environment. Based on this information, this PCHB condition has not been added to the permit. Additional discussion regarding mitigation can be found in Paragraph 10(A)(5) below.

Regarding PCHB Condition 12 (Wetland redelineation), I have completed an independent analysis of the adequacy of the mitigation, including review of potential impacts to the areal extent of the remaining wetlands. I have determined the proposed mitigation plan is reasonable and specifically designed for this project site to compensate for the loss of wetlands. I have added two special conditions requiring redelineation of the remaining wetlands and additional monitoring requirements to assess unforeseen indirect impacts (see Paragraphs 10(A)(5), (10)(A)(10)(h), and 12(M) below). If adverse changes do occur, I have the option of modifying, suspending or revoking the permit. The NRMP also allows adaptive management to be used to assess the cause(s) and remedy the situation. I believe a variety of options need to remain available especially if the cause for adverse changes are outside of the Port's control. Therefore, this PCHB condition has not been added to the permit.

B. Fish and Wildlife (33 CFR 320.4(c)).

(1) Impacts. Regarding impacts to fish, the proposed project will directly impact 980 linear feet of Miller Creek being realigned at the north end of the project to allow construction of the runway. Temporary impacts to fish and fish habitat could occur during construction as a result of soil disturbance and movement and the proposed creek enhancement mitigation. As a result of these projects there could be increased sediment laden runoff, increased turbidity in the creeks, changes to peak, base, and low flows, and other impacts to water quality. Temporal impacts include the time it will take for the realigned and enhanced portions of Miller Creek to equilibrate to the new configuration, habitat components, and hydrological pathways resulting from the construction and operation of the facility. Indirect impacts could include changes to the food chain support system including reduction or changes to species richness and changes to organic carbon support.

Regarding impacts to wildlife, the proposed project will alter approximately 480 acres of existing wildlife habitat in Miller, Walker, and Des Moines creeks for the runway, borrow area, and SASA portions of the projects. Existing forested, scrub/shrub, emergent, and open water areas will be changed to buildings, paved areas, managed pasture areas, or in the case of the borrow areas, monotypic vegetation communities. These changes will eliminate some wildlife habitat causing the species currently using these areas to relocate. If the surrounding areas are already at capacity, there may be some reduction in population numbers. Operation of the airport will also directly impact the wildlife because active steps are taken to minimize wildlife use in the areas surrounding the runways to minimize collisions between wildlife and airplanes. There will be temporary impacts as a result of the noise from construction. Temporal impacts will occur until the vegetation planted as a part of the proposed mitigation matures and begins providing

established for the drainage layer cover. In most instances, the PCHB appears to have selected either the lowest back calculated number available or Puget Sound background levels, whichever was lower.[18] However, for three of the constituents, chromium, selenium, and silver, the PCHB selected criteria lower than background levels. While selecting the most protective criteria is understandable, selecting levels below natural background levels is not. If some of the constituents are naturally at higher levels that have not raised either human or aquatic health concerns, then the lower criteria are not justifiable. The Services also reviewed the fill criteria during the ESA consultation process and made modifications to Ecology's initial levels as reflected in the 21 September 2001 WQC. The Services determined these modified criteria were protective of aquatic species, ESA listed species in particular. Ecology, the agency with primary responsibility regarding water quality standards and implementation of Section 307 in the state of Washington, also believed the criteria established in the WQC were adequately protective. Both the USFWS and Ecology also believed the more restrictive criteria for the drainage layer and less restrictive criteria for the remainder of the embankment were adequate for protection of the aquatic environment. Based on my review, I have determined this PCHB condition does not need to be added to the permit. See Paragraph 10(A)(7) below for additional discussion. As for the fill already in place, it meets the criteria in place at the time the fill was imported. The PCHB did not make the criteria retroactive to the fill already in place.

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.[19] The USFWS also allowed the use of SPLP testing through their Section 7 BO. 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 SLPL testing does not need to be added to the permit.

Regarding Condition 9 (Number of fill testing samples), Ecology's expert testified that more samplings were needed than specified in the WQC. This condition has been added to the permit.

Regarding Conditions 13 (Water quality exceedances) and 14 (Extension of monitoring if there are exceedances), the Corps does not have the authority to require Ecology to take any compliance actions regarding any aspect of their program. If water quality exceedances in either surface or ground water criteria are found, pursuant to 33 CFR 325.7, the DE may modify, suspend, or revoke the permit as necessary. These PCHB conditions specifying what Ecology "shall" do have not been added to the permit.

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[18] Various starting points for the back calculations were used including ambient water quality criteria, drinking water criteria, chronic and acute fish exposure criteria.

[19] The SPLP test was used by EPA for the Bunker Hill cleanup project for the fate and transport study.