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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,	)	
	)	No. 04-_____
Appellant,	)	
v.	)	NOTICE OF APPEAL
	)	
STATE OF WASHINGTON,	)	(Section 401 Certification No.
DEPARTMENT OF ECOLOGY; and	)	1996-4-02325 (Amended-2))
THE PORT OF SEATTLE,	)	
	)	
Respondents.	)	

**I. APPEALING PARTY**

The appealing party is the:

Airport Communities Coalition (composed of the Cities of Burien, Des Moines, Federal Way, Normandy Park, and Tukwila, and the Highline School District)  
19900 4th Avenue SW  
Normandy Park, WA 98166  
Tel. (206) 870-7836 / Fax (206) 870-3442

The appealing party is represented by:

Peter J. Eglick / Michael P. Witek  
Helsell Fetterman LLP  
1001 Fourth Avenue, Suite 4200  
P.O. Box 21846  
Seattle, WA 98111  
Tel. (206) 292-1144 / Fax (206) 340-0902



1 Appellant Airport Communities Coalition (ACC) is an entity established by interlocal  
2 agreement and composed of the Cities of Burien, Des Moines, Federal Way, Normandy Park,  
3 and Tukwila, and the Highline School District, with a combined population of over 150,000  
4 citizens. ACC was formed for the purpose of, *inter alia*, participating in the governmental  
5 review process related to the Port of Seattle's proposed third runway and related Master Plan  
6 developments ("Third Runway Project") at Seattle-Tacoma International Airport ("Sea-Tac  
7 Airport" or "STIA"). The ACC municipalities and school district are particularly adversely  
8 affected by construction of the Third Runway Project. The ACC municipalities have  
9 particular stewardship responsibilities per state law and their municipal codes and  
10 comprehensive plans for the streams and watersheds within their boundaries, including Des  
11 Moines Creek, Miller Creek, Walker Creek, and Gilliam Creek.

13 ACC has been actively engaged in review of the Third Runway Project, including its  
14 appeal to this Board of Ecology's two previous 401 certifications for the project (consolidated  
15 under PCHB No. 01-160), and the parties' subsequent appeals of the Board's decision which  
16 resulted in a decision by the Washington Supreme Court on May 14, 2004, in *Port of Seattle,*  
17 *et al. v. Pollution Control Hearings Board, et al.*, -- P.3d --, 2004 WL 1075236. ACC and its  
18 members have a vital interest in ensuring that the Port's proposed project complies with the  
19 requirements of the Clean Water Act, state water quality laws and the State Supreme Court's  
20 decision.

## 22 II. ADDITIONAL PARTIES

23 In addition to the appealing party, the parties to this appeal are the Washington  
24 Department of Ecology, P.O. Box 47600, Olympia, WA 98504-7600, which issued the  
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1 decision for which review is sought, and the Port of Seattle, P.O. Box 68727, Seattle, WA  
2 98168, the applicant.

3 **III. ORDER OR DECISION APPEALED FROM**

4 ACC appeals from the Washington Department of Ecology's June 7, 2004, issuance of  
5 Clean Water Act Section 401 Certification No. 1996-4-02325 (Amended-2) to the Port of  
6 Seattle (the "2004 Certification"). This Certification purports to incorporate the decision of  
7 the Washington Supreme Court in *Port of Seattle, et al. v. Pollution Control Hearings Board,*  
8 *et al.*, -- P.3d --, 2004 WL 1075236 (May 14, 2004). A copy of the 2004 Certification is  
9 Attachment 1 to this Notice of Appeal.

10  
11 The Third Runway Project, from concept through mitigation, involves design,  
12 engineering, and construction activities at an unprecedented scale and with the potential for  
13 unprecedented impacts on the water quality of the nearby streams and wetlands. Despite clear  
14 directives from the Supreme Court that contaminated sites may not be used for importation of  
15 fill material, such sites are nonetheless proposed for use. Despite a clear ruling from the  
16 Supreme Court that no soils contaminated with gasoline, diesel or heavy oil ("TPH") may be  
17 used, such fill is planned for use, substantially threatening water quality. These and other  
18 errors in the 2004 Certification are inconsistent with the governing Supreme Court mandate,  
19 the Clean Water Act, and applicable water quality laws.

20  
21 **IV. FACTS**

22 The facts surrounding the Third Runway Project were fully briefed to the Board in  
23 Case No. 01-160. For the third runway to be built level with Sea-Tac's existing two runways,  
24 more than 20 million cubic yards of fill must be dumped into wetland- and stream-laced  
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1                   **1.       Use of Fill Material from Contaminated Sites**

2                   The State Supreme Court held, in reliance on prior iterations of the 401 Certification,  
3 that, "If the proposed borrow site was ever contaminated, even if it had since been  
4 rehabilitated, its dirt may not be used as fill for the third runway." Slip Op. at 53.  
5 Nonetheless, under the aegis of Ecology's 2004 Certification, soils are proposed from  
6 importation and placement from contaminated sites, including for example the Maury Island  
7 site contaminated by historic emissions from the Asarco smelter in Tacoma, as fill sources for  
8 the third runway. Ecology's 2004 Certification which is being applied to allow such  
9 importation therefore violates not only the Supreme Court mandate, but state water quality  
10 standards and in particular the anti-degradation standard, and is thus inconsistent with Clean  
11 Water Act section 401.  
12

13                   **2.       Use of Fill Material Contaminated with Total Petroleum Hydrocarbons**  
14                   **("TPH")**

15                   In Case No. 01-160, the PCHB determined that, to meet water quality laws, gasoline,  
16 diesel and heavy oils could not be permitted within fill material imported to the third runway  
17 site. The State Supreme Court upheld this ruling:

18                   Because this court will defer to the PCHB's determinations as to witness credibility,  
19 we conclude that there was substantial evidence in the record to support a finding that  
20 Ecology's section 401 certification fill criteria for gas, diesel, and heavy oils were not  
adequate. Therefore, we ... set fill criteria for TPH at zero.

21 Slip Op. at 59. The 2004 Certification nevertheless permits a testing procedure incapable of  
22 detecting gasoline at concentrations less than five milligrams per kilogram (mg/kg); diesel, at  
23 concentrations less than 25 mg/kg; and heavy oils, at concentrations less than 100 mg/kg.

24 This effectively allows use of soils contaminated with TPH at levels up to 5 mg/kg of  
25



1 gasoline, 25 mg/kg of diesel, and 100 mg/kg of heavy oils. Permitting the use of soils  
2 containing TPHs at these levels violates the Supreme Court mandate as well as state water  
3 quality laws and the anti-degradation standard.

4 **3. Acceptance of Numeric Standards for SPLP Comparison That Do Not**  
5 **Accurately Reflect State Surface and/or Groundwater Standards**

6 The Supreme Court decision, which the 2004 Certification purports to incorporate,  
7 held that both surface water and groundwater standards must be used to evaluate SPLP  
8 samples. Slip Op. at 67. However, the 2004 Certification allows numeric standards which do  
9 not accurately represent the mandated state surface water and/or groundwater standards, thus  
10 permitting the importation of fill materials that will result in violations of the Supreme Court  
11 decision and state surface or groundwater standards from third runway fill embankment  
12 leachate.

13  
14 **4. Improper Dilution of Groundwater Samples**

15 The PCHB determined in Case No. 01-160 that the Port's SPLP Workplan was  
16 inadequate for its failure to compare SPLP test results against state groundwater standards.  
17 The State Supreme Court required modification of the 401 Certification "such that the SPLP  
18 leachate must be compared against both surface and groundwater quality criteria." Slip Op. at  
19 67. The 2004 Certification states accordingly that, "Results from the SPLP will be compared  
20 to freshwater ambient water quality criteria according to the guidelines outlined in WAC 173-  
21 201A-040 and the groundwater quality criteria in WAC 173-200-040 (adjusted for PQLs)."  
22 2004 Certification at Attachment E, p. 3. However, the 2004 Certification then states, "As an  
23 initial screening tool, the constituent concentrations as determined from the SPLP will be  
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1 divided by a dilution factor of 20.” The approval of the use of this and other dilution factors  
2 violates the Supreme Court decision as well as the anti-degradation standard and other  
3 applicable water quality laws. *Id.*

#### 4 **5. SPLP Sampling**

5 In PCHB condition 9 of the Certification (which was not appealed and therefore  
6 upheld), the PCHB required that, "the minimum number of samples of proposed fill shall be  
7 increased to reflect the minimum number of samples required under MTCA." However, the  
8 2004 Certification does not require that same number of samples where SPLP is used to  
9 approve a site, and thus allows a statistically flawed procedure (resulting from too few  
10 samples) which does not assure compliance with applicable water quality laws.

#### 11 **6. Additional Provisions of the 2004 Certification Are Inconsistent with the 12 Supreme Court's Mandate**

13 Other provisions of the 2004 Certification also violate the Supreme Court's decision  
14 as well as the prior PCHB decision in Case No. 01-160 to the extent it was not modified by  
15 the Supreme Court.

#### 16 **7. The 2004 Certification's Inconsistency with the Supreme Court Decision 17 Results in a Lack of Reasonable Assurance**

18 By going beyond the bounds of the Supreme Court's decision, the 2004 Certification  
19 violates the fundamental tenet that there must be reasonable assurance that the project will not  
20 violate state water quality standards in affected surface waters, pursuant to, *inter alia*, 33  
21 U.S.C. § 1341; 40 CFR § 121.2; RCW 90.48.080; Ch. 173-201A WAC; and Ch. 173-200  
22 WAC. *See Friends of the Earth, et al. v. Department of Ecology*, PCHB Nos. 87-63 and 87-  
23 64, Final Findings of Fact, Conclusions of Law and Order at 25-26 (1988).

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VI. RELIEF SOUGHT

ACC seeks the following as relief:

1. An order reversing and modifying the 2004 Certification to the extent that it is inconsistent with the Supreme Court's decision and/or those portions of the PCHB's modified 401 Certification which were upheld and/or were not overturned by the Supreme Court's decision.

2. A stay of the effectiveness of the June 7, 2004, Section 401 Certification and all prior 401 Certifications which allow work to be performed, until compliance with the Supreme Court mandate and Clean Water Act has been resolved.

3. Abatement and restoration of all sites filled or altered in violation of the Supreme Court decision and/or those portions of the PCHB's modified 401 Certification which were upheld and/or were not overturned by the Supreme Court's decision.

4. Such other relief as the Board deems equitable and just.


Appellant requests that all further notices and pleadings in this matter be served upon its attorneys at the address given in section 1 above.

DATED this 8 day of July, 2004.

Respectfully submitted,

HELSELL FETTERMAN LLP

By:

  
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