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ENVIRONMENTAL
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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,) PCHB No. 01-160
v.) ACC'S REPLY IN SUPPORT OF ITS
STATE OF WASHINGTON,) MOTION TO THE BOARD FOR
DEPARTMENT OF ECOLOGY; and) CORRECTION, CLARIFICATION,
THE PORT OF SEATTLE,) AND/OR PARTIAL RECONSIDERATION
Respondents.) OF ORDER PUBLISHING CERTAIN
PORTIONS OF DEPOSITIONS OF
ECOLOGY MANAGERS AND CR 30(b)(6)
DESIGNATED WITNESSES

I. INTRODUCTION

In general, the Port of Seattle picks and chooses among the corrections, clarifications and reconsiderations proposed by ACC, accepting that the Board can effect some, while objecting on spurious grounds to others. The Board should review each of the items listed by ACC on its merits, rather than following the Port's argumentative detour route.

1. The Motion Is Timely

The Port acknowledges that the Board's rules on reconsideration govern only final orders, and that the depositions Order here is not a final order concluding a case. It then argues that the Board should follow CR 59, which, once again, governs requests for a new trial, reconsideration, and amendment of final judgments. CR 59(a). None of these rules apply to procedural orders

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ACC'S REPLY ON MOTION FOR PARTIAL
RECONSIDERATION OF ORDER
PUBLISHING DEPOSITIONS - 1

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1 entered in the course of proceedings. Further, there is good reason not to apply them here. The
2 problems and contradictions inherent in the April 22 Order did not become apparent until the parties
3 went through the process of reviewing the entire record for preparation of proposed findings and
4 conclusions. That process required reviewing hundreds of pages of depositions and over two
5 thousand pages of hearing transcripts, as well as numerous exhibits.
6

7 **2. The Cases Cited by the Port Do Not Address Interlocutory or Procedural**
8 **Motions**

9 Continuing in the same vein, the Port relies on cases which have no relevance to
10 interlocutory or procedural motions, but are addressed strictly to motions for a new trial. For
11 example, *Weems v. North Franklin School District*, 100 Wn. App. 767, 37 P.3d 354 (Div. 3 2002),
12 concerned a motion for reconsideration and a new trial brought after the Superior Court had already
13 reviewed and upheld a school district decision on the merits. In *Perry v. Hamilton*, 51 Wn. App.
14 936, 756 P.2d 150 (Div. 3 1998), *rev. denied*, 111 Wn.2d 1017 (1988), also cited by the Port, a
15 motion for reconsideration of a dismissal was granted and the Court of Appeals subsequently
16 reversed on the merits of the jurisdiction issue. This case provides no support for the Port's
17 argument here. Finally, *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95
18 Wn. App. 896, 977 P.2d 639 (Div. 2 1999), concerns a request for reconsideration of summary
19 judgment based on new evidence, and does not address at all the question raised here.
20

21 **3. The Port's Response Mischaracterizes Previous Board Rulings and the Nature of**
22 **ACC's Request for Reconsideration and Clarification**

23 The Port's assertions that ACC's motion reargues positions which the Board "already ruled
24 on during the hearing on the merits" and "has already found to be without merit" are grossly
25 incorrect. Port Opp. at 3. The Board's earlier Order dated March 19, 2002, established that

1 depositions would be published, but allowed respondents an opportunity to identify particular
2 objections to specific portions. Subsequently, the April 22 Order rejected some and upheld other
3 Ecology/Port objections to (some) deposition testimony. The Port's attempt to spin ACC's request
4 for reconsideration of the April 22 Order into an alleged attempt to "reargue" issues "already ruled
5 on" by the Board "during the hearing" ignores the actual record.
6

7 As pointed out in ACC's Motion, in several instances, the April 22 Order is problematic
8 because it allows testimony related to a topic, but then excludes another part of the same discussion.
9 *See, e.g.*, Motion at p. 3, #2 (part of discussion of Tom Luster's removal admitted; part excluded);
10 Motion at pp. 6-7, #7 and #8 (portions carved out of middle of discussion of political pressure, rest
11 of which was admitted); Motion at p. 7, #9 (portions of discussion related to Dyanne Sheldon
12 excluded; other portions admitted). It is such instances which ACC seeks to have redressed through
13 its motion, so that the Board has the full discussions available for its consideration.
14

15 The Civil Rules concerning use of depositions in fact explicitly call for inclusiveness -- not
16 editing -- when the concern is to make sure the decision-maker is fully informed. After first
17 providing that depositions such as those at issue here "may be used by an adverse party for any
18 purpose" (CR 32(a)(2), emphasis added), they provide in CR 32(a)(4) that:

19 If only part of a deposition is offered in evidence by a party, an adverse party may require
20 him to introduce any other part which ought in fairness to be considered with the part
21 introduced, and any party may introduce any other parts.

22 The problem, then, here is that the April 22 Order inconsistently edits out portions of
23 depositions on a given topic while leaving intact other portions concerning the same topic -- the
24 reverse of the procedure called for under the Civil Rules to give the decision-maker a full and fair
25 picture.

AR 000925

1 Further, the Port's justification for this anomaly -- that the Board has "previously rejected"
2 (Opp. at 3) the relevance of some of the disputed deposition portions -- does not hold water. In fact,
3 the Board at trial allowed testimony related to the interplay among the Port, the Governor's Office
4 and Ecology. *See, e.g.*, Tr. at Day 1, pp. 108-112 (Kenny testimony); Tr. at Day 7, p. 165 (White
5 testimony). That the April 22 Order is not entirely consistent with what occurred at the hearing is
6 understandable. It was entered weeks after the hearing, but weeks before the hearing transcripts
7 became available. That is why reconsideration and clarification are appropriate and why ACC has
8 requested them.
9

10 As also pointed out in ACC's Motion, many of the deposition portions excluded bear
11 directly on Ecology's repeated claims that its decision was made by a team of technical experts who
12 were uninfluenced by outside pressure. This claim should not be evaluated in the absence of the
13 first two examples cited by the Port (Opp. at 3) of deposition testimony which ACC seeks to have
14 admitted -- Fitzsimmons Dep. at p. 39, lines 3-10, and at p. 61, line 11 - p. 77, line 4; discussed in
15 ACC's Motion at pp. 2-3, #1 and #2. They are necessary to provide a full, fair, and balanced record.
16

17 Similarly, the portions of the Stockdale Dep. at p. 126, line 19, to p. 127, line 21, and p. 129,
18 line 17, to p. 130, line 8 -- discussed in ACC's Motion at pp. 6-7, #7 and #8 -- are necessary to
19 provide a full picture in light of respondents' glowing claims. These portions describe, *inter alia*, a
20 phone call from the Port to the Governor's Office, a call from the Governor's Office to Ecology's
21 Gordon White (who signed the 401), and then a call from Mr. White to Erik Stockdale on his cell
22 phone -- all within 20 minutes of the end of a meeting between Mr. Stockdale and the Port. As
23 pointed out in ACC's motion, this description -- excluded by the April 22 Order -- occurred in the
24 midst of a longer discussion on similar topics, the rest of which was admitted. If the excerpts are
25

1 omitted, a serious misimpression is created, by the portions of testimony concerning the same topic
2 which were not excluded. This is the reverse of the procedure contemplated by CR 32(a)(4). The
3 Board should be able to read the entire discussion at issue in order to be fully informed.

4
5 The sixth example cited by the Port at page 3 of its Opposition -- Stockdale Deposition at p.
6 135, line 23 - p. 136, line 25; and p. 138, line 23, to p. 139, line 11; discussed in ACC's Motion at p.
7 7, #9 -- concerns Ecology's ultimate selection of Katie Walter as an outside "independent" wetlands
8 consultant over its first choice, Dyanne Sheldon, and the role the Port played in that decision.¹ The
9 Port again claims that the Board has "previously rejected" the relevance of this topic.² However,
10 the only determination regarding these particular deposition excerpts is in the April 22 Order which
11 ACC is asking the Board to reconsider. In fact, during the hearing, Ecology attempted to object on
12 relevance grounds to testimony by Mr. Stockdale concerning the fact that Ms. Sheldon was
13 Ecology's first choice, and Presiding Officer Cottingham overruled the objection. Tr. at Day 6, p.
14 195.

15
16 The last example cited by the Port on page 3 of its Opposition -- Hellwig Dep. at 78, line 22,
17 to p. 86, line 13; discussed in ACC's Motion at pp. 8-9, #1 -- again concerns the intense political
18 pressure which pervaded the 401 process, belying Ecology's repeated claims that an unfettered
19 "team" of technical experts alone made the § 401 determination. As explained in ACC's Motion (at
20 pp. 8-9), however, this is another example where an excerpt was carved out of a larger discussion
21 which was admitted, creating a misimpression which favors the Port and Ecology's claims. The
22

23 ¹ The Port discusses this testimony in more detail in section 3 of its Opposition, addressed below.

24 ² After each example the Port cites on page 3 of its Opposition, it puts in parentheses its justification for
25 the excerpt's exclusion. After citing ACC's discussion of the Stockdale/Sheldon excerpts, the Port states,
"same)" -- i.e., same justification as the previous example it cited, which was "(reasserting relevance that
had been previously rejected)."

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1 Board should be able to read the entire discussion.

2 Finally, the Port's suggestion that it is appropriate to exclude deposition testimony from
3 parties and agents whose testimony must automatically come in as evidence pursuant to CR
4 30(b)(6) and CR 32(a)(2) overlooks the explicit March 19 Order on this point, which acknowledged
5 appellant's right to submit such deposition testimony regardless of whether the party in question
6 testified in person at the hearing. The Port's suggestion that ACC should have elicited from
7 witnesses³ at the hearing the very same testimony which, under the Civil Rules, there was a right to
8 submit through deposition into the record "for any purpose" is misplaced, particularly in the context
9 of this case. Time was a scarce commodity at the hearing, and the Board had made it clear that it
10 did not wish repetition of matters which could be otherwise reviewed in documentary form.

11
12
13 **4. The Port Seeks to Exclude from the Record Relevant Testimony,
Mischaracterizing the Purpose of Its Submission**

14 The Port suggests that admission of the deposition testimony cited by ACC would not
15 "fairly represent the facts." However, as ACC points out above and in its Motion, the April 22
16 selections made of portions of deposition testimony, such as Mr. Stockdale's, actually serve in some
17 cases to leave an inaccurate impression on the record. Per the Civil Rules, the full Board should be
18 given all of the applicable testimony, rather than testimony reflecting just one perspective, so that it
19 can draw its own conclusions.

20
21 The instance which the Port focuses on in section 3 of its Opposition, concerning Mr.
22 Stockdale's deposition testimony relating to Dyanne Sheldon, was identified by ACC as a concern
23 for the reasons stated in ACC's original motion: not only because it confirms Ms. Sheldon's
24

25 ³ The Port does not emphasize that Mr. Hellwig and Mr. Fitzsimmons were never presented by respondents at the hearing despite their integral roles in issuance of the § 401 certification.

1 expertise, but also because it contradicts Ecology's repeated claims that its "team" of experts was
2 unaffected by outside pressure. Motion at 7. The excluded deposition testimony contains
3 admissions by Mr. Stockdale, for example, that Dyanne Sheldon was Ecology's first choice (p. 136,
4 lines 15-17), that the Port told Mr. Stockdale that it did not want Ms. Sheldon hired to review its
5 wetland mitigation proposals (p. 136, lines 18-25), and that the Port went to the Governor's Office
6 to complain about the potential hiring of Ms. Sheldon (p. 138, line 23 - p. 139, line 11).
7

8 Review of the deposition testimony portion as edited in the April 22 Order is instructive.
9 The Order carved out some portions of the Sheldon discussion, while leaving others in. *See*
10 Stockdale Dep. at p. 135, line 23, to p. 155, line 1. Once portions of deposition testimony on the
11 topic are published, then the full Board should be able to read the entire testimony on the topic.
12 Indeed, if the entire testimony is read, then the Port's spin (Opp. at 4) that Ms. Sheldon was not
13 hired because "she failed to submit a responsive bid to Ecology's RFP" is undercut by the
14 (excluded) testimony which reveals that the less-qualified outside consultant selected by Ecology
15 was permitted to bid for the contract in a different manner than Ms. Sheldon, after the Port
16 complained to Ecology and the Governor's Office about Ms. Sheldon. The Board can draw its own
17 conclusions -- but only if it is given all of the information.
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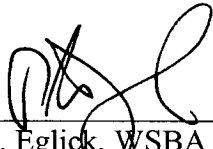
1 **Conclusion**

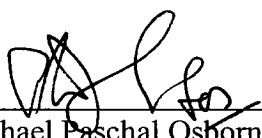
2 For all the reasons discussed above and in its Motion, ACC requests that the Board enter an
3 order publishing the noted deposition excerpts and correcting the inconsistencies between the Order
4 Publishing Depositions and the redacted depositions.

5 DATED this 6 day of June, 2002.

6
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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION)
And CITIZENS AGAINST SEA-TAC)
EXPANSION,)

Appellant,)

v.)

STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY; and)
THE PORT OF SEATTLE,)

Respondents.)

No. 01-160

CERTIFICATE OF SERVICE

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

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

On June 6, 2002, I sent via facsimile and via U.S. Mail, first class, a true and correct copy
of ACC's Reply in Support of Its Motion to the Board for Correction, Clarification and/or Partial
Reconsideration of Order Publishing Certain Portions of Depositions of Ecology Managers and
CR 30(b)(6) Designated Witnesses in the above-captioned matter to:

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CERTIFICATE OF SERVICE - 1

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

16 DATED this 6th day of June, 2002, at Seattle, Washington.

18 
19 Andrea Grad

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25 **AR 000932**