POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION and CITIZENS AGAINST SEA-TAC EXPANSION, Appellants, v. DEPARTMENT OF ECOLOGY and THE PORT OF SEATTLE, Respondents.	No. PCHB 01-160 PORT OF SEATTLE'S RESPONSE TO ACC'S MOTION FOR CORRECTION, CLARIFICATION AND RECONSIDERATION OF BOARD'S DECISION PUBLISHING PORTIONS OF DEPOSITIONS

The Port of Seattle ("Port") submits the following response to ACC's motion to correct, clarify and reconsider the Board's earlier Order Publishing Certain Portions of Depositions of Ecology Managers and CR 30(b)(6) Designated Witnesses ("Board's Prior Order").

In those instances where ACC seeks to merely correct errors in the Board's Prior Order that have been revealed by the transcript, viz., Stockdale Item Nos. 2, 4 and 11, and Hellwig Item Nos. 3, 5, 6 and 7, i.e., where particular lines were left out or the portions of the transcript transmitted with the Order were incorrect, the Port does not oppose ACC's Motion.

In all other instances, however, the Port strongly opposes ACC's motion for reconsideration of the Board's Prior Order. The motion should be denied as (1) untimely, (2) an unwarranted attempt to reargue issues that have already been ruled on by the Board, (3) an effort to insert evidence after the hearing that was available for ACC to elicit either through direct or cross-examination of witnesses who testified at the hearing, and (4) an attempt to proffer deposition testimony that presents a distorted picture of the evidence.

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1. Motions for Reconsideration Must Be Brought Within 10 Days of the Entry of the Original Order.

The Board's rule on reconsideration (WAC 371-08-550) only deals with the reconsideration of final orders. Because ACC is seeking reconsideration of an interim ruling, under WAC 371-08-300(2), the Board looks to the Civil Rules for procedural requirements. CR 59 governs motions for reconsideration following a trial; motions to reconsider interim orders are often considered under this same rule or under pertinent local rules. In every instance, the rules are clear that a motion to reconsider must be brought within 10 days after a written order is entered. *See* WAC 371-08-550(1)(a); CR 59(b); Thurston County LCR 59(a)(2).[1] Since the Board's Prior Order was entered on April 22, 2002, any motion for reconsideration must have been brought on or before May 2, 2002 in order to be timely. ACC's Motion, coming as it does more than 50 days after the close of the hearing on the merits, is well beyond this time limit.

2. ACC's Motion Fails To Demonstrate a "Manifest Error" or Cite New Evidence That Was Not Available For Presentation During the Hearing.

A motion for reconsideration is directed to the discretion of the decision-maker, and requires that the moving party demonstrate that the earlier decision was based on "untenable grounds" or constituted "manifest error." In the recent case of *Weems v. North Franklin School Dist.*, 100 Wn. App. 767, 777-78, 37 P.3d 354 (2002), the Court of Appeals noted that a motion for reconsideration would normally be denied unless the moving party showed that the earlier decision was based on "untenable grounds or untenable reasons." *Cf. Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (motion for reconsideration is addressed to the sound discretion of the trial court whose judgment will not be reversed absent a showing of manifest abuse), *rev. denied*, 111 Wn.2d 1017 (1988).

Washington's courts have also consistently held that reconsideration should not be granted unless "the moving party presents new and material evidence that it could not have discovered and produced at trial." *Wagner Development, Inc. v. Fidelity and Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999); *Weems*, 100 Wn. App. at 78 (motion for reconsideration and for new

[1] This same rule as to timing is found in Fed. R. Civ. P. 59(b).

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trial properly denied when untimely and based on issues previously raised and already ruled on by the court).

In this regard, the Thurston County Local Rules' "Standard" for granting motions for reconsideration is particularly relevant. LCR 59(a)(3) "*Standards*" provides that:

> Motions for reconsideration are disfavored. The court will ordinarily deny such motions in the absence of a showing of manifest error in the prior ruling or a showing of new facts or legal authority which could not have been brought to its attention earlier with reasonable diligence.

Apart from the few corrections noted above, ACC's motion does little more than reassert and reargue positions that the Board already ruled on during the hearing on the merits. ACC has used the publication of the hearing transcript as a vehicle to reiterate positions that the Board has already found to be without merit. *See, e.g.,* Motion at 2:16-21 (rearguing undue political influence as a basis for testimony); 3:10-12 (reasserting relevance argument previously rejected by Board); 4:25 – 5:5 (rearguing relevance and lack of foundation position that was previously rejected by Board); 6:7-13 (reasserting undue political pressure argument previously rejected by the Board); 6:17-18 (reasserting relevance that had been previously rejected); 7:7-8, 20-23 (same); 8:6-13 (reasserting undue political pressure argument previously rejected by the Board).

In addition, much of the deposition testimony ACC seeks to publish came from witnesses who appeared at the hearing on the merits and from whom ACC could have presented such testimony, either on direct (Tom Luster) or cross-examination (Erik Stockdale). ACC has offered no basis for its failure to elicit this testimony from witnesses who testified at the hearing, nor has it presented any "manifest error" or new facts that would justify the Board's reconsideration of its prior ruling.

3. ACC's Proffered Evidence Presents a Distorted Picture.

Because ACC's motion is so clearly untimely and fails to supply appropriate grounds for reconsideration of the issues that the Board has previously considered and ruled upon, the Port will not address each of the proffered transcripts individually. However, the Port must point out that, notwithstanding its position that it seeks only to correct "inaccurate impression[s]", ACC actually fosters

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misperception by requesting the publication of deposition testimony that does not fairly represent the facts. The clearest example of this is the 9th request for publication of deposition excerpts from Eric Stockdale, which ACC asserts is necessary to give a clear picture of why Ecology chose to hire Shannon & Wilson, instead of Dyanne Sheldon. ACC claims that the testimony is relevant to show "Ecology's acknowledgement of the expertise of Dyanne Sheldon," apparently for the purpose of impeaching Ecology's decision not to hire Ms. Sheldon as a consultant. In fact, Mr. Stockdale was very clear in his deposition that the reason that Ms. Sheldon was not considered by Ecology was that she failed to submit a responsive bid to Ecology's RFP: *See* Stockdale Deposition, 153:15 – 155:1 (testimony previously admitted pursuant to the Board's Prior Order).

For this reason, if the Board is inclined to grant any portion of ACC's motion, the Port requests that it take the approach that it did in its Prior Order and allow both the Port and Ecology the opportunity to provide counter-designations of deposition testimony in order to assure that an accurate picture of the deposition testimony appears in the record.

4. Conclusion

ACC's motion (1) is untimely; (2) fails to present any substantial "error" committed by the Board in ruling on ACC's prior motion; (3) reargues issues on which the Board has previously ruled against ACC or attempts to present evidence that was available for presentation by ACC at the hearing; and (4) offers a distorted picture of the evidence. For each of these reasons, apart from correcting discrepancies between the transcript and the Board's Prior Order, the Board should deny ACC's motion.

Respectfully submitted this 31ST day of May, 2002.

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