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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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

INTRODUCTION

ACC moves the Board for correction, clarification, and/or partial reconsideration of portions of its Order Publishing Certain Portions of Depositions of Ecology Managers and CR 30(b)(6) Designated Witnesses ("Order Publishing Depositions"), as detailed below.

ACC is bringing this motion because recently, in the course of reviewing hearing transcripts received over the past several days and preparing draft Findings and Conclusions, it has become apparent that there are discrepancies among the Order Publishing Depositions, the redacted depositions transmitted by the Board with the Order, and the hearing testimony itself. These fall into three categories:

AR 001015

(1) Instances where the Order Publishing Depositions lists testimony as admitted or

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2 excluded, but the Board-redacted depositions indicate the opposite;

3 (2) Instances where, perhaps inadvertently, excerpts were carved out and excluded from
4 larger portions of a discussion -- which is admitted -- thereby creating a misleading impression of
5 the witness' testimony and an incomplete record; and

6 (3) Instances where topics excluded from the depositions on relevance grounds are
7 addressed in the actual hearing transcripts (just recently received), rendering the excerpts relevant to
8 the Board's consideration.

9
10 ACC is not asking for correction of all such instances, but only those which are most
11 significant.

12 **A. Deposition of Thomas Fitzsimmons**

13 **1. Page 39, lines 3-10:**

14 The Order excluded page 36, line 21, through page 39, line 10, on the grounds of no
15 personal knowledge and relevance. However, page 39, lines 3-10 contain an admission by Mr.
16 Fitzsimmons concerning intervention by the Governor's Office which sheds considerable light on
17 respondents' claims to the Board at hearing.

18
19 Ecology and the Port went to great lengths at the hearing to convince the Board that it
20 should defer because Ecology's § 401 decision was made exclusively by a "team" of technical
21 experts without regard to extraneous factors. *See, e.g.*, Tr. at 1-0043 - 0044¹ (Ecology's opening
22 statement: team of experts assembled to insure water quality standards are met); Tr. at 1-0212 (line
23 13) - 0014 (line 8) (Kenny: team reviews project and makes decision); Tr. at 7-0160 (line 25) -
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¹ The Court Reporters have paginated the hearing transcript by the day number (1 - 10), then page number, so "1-0043" represents day one, page 43.

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2 0161 (line 13) (White: he relied on team of technical experts to make decision); Tr. at 10-0164 (line
3 20) - 0165 (line 5) (Ecology's closing argument: quoting from Gordon White's prefiled testimony
4 regarding high quality of Ecology's technical team).

5 **2. Page 61, line 11, to page 77, line 4:**

6 This excerpt continues a discussion -- which was admitted by the Board -- concerning the
7 circumstances surrounding Tom Luster's removal from review of the Third Runway Project. The
8 excerpt then goes on to discuss the circumstances surrounding the Port's withdrawal of its
9 application to avoid denial of certification by Ecology, in late September 2000. The Order excluded
10 this excerpt on relevance grounds. However, the circumstances of Mr. Luster's removal were raised
11 at the hearing by counsel for both sides in questioning Mr. Luster. *See, e.g.*, Tr. at 2-0098 (line 22) -
12 0103 (line 4) (Port counsel question about whether reassignment was part of routine Ecology
13 regionalization process). Mr. Luster's reassignment was also discussed in his deposition, which is
14 Exhibit C to his Prefiled Testimony (*see, e.g.*, Luster Dep. at p. 194 (line 5) - p. 195 (line 9)).

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17 **B. Deposition of Erik Stockdale**

18 **1. Page 7, line 12,² to page 11, line 21:**

19 The excerpt concerns Mr. Stockdale's knowledge and observations about the Vacca Farm
20 condemnation case, in which Port consultant Jim Kelley testified that Vacca Farm was already a
21 wetland (*see* Sheldon Prefiled Testimony, Ex. D³; *see also* Ex. 624⁴), thus reducing the value of the
22 land to be condemned, to the Port's benefit. The Port is now claiming mitigation credit for Vacca
23

24 ² The Order lists this as page 7, line 43, but there is no line 43 on page 7.

25 ³ Verbatim Report of Proceedings dated June 5, 2001, in *Port of Seattle v. RST Enterprises*, King County Cause No. 99-2-26788-5 KNT

⁴ March 15, 2001, Deposition of James C. Kelley, in *Port of Seattle v. RST Enterprises, et al.*, King County Superior Court Cause No. 99-2-26788-5 KNT

AR 001017

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2 Farm as a wetland “restoration” area (Tr.. at 10-0034, lines 7-21 (Kelley)). This subject was
3 subsequently discussed at length in the Prefiled Testimony of Dyanne Sheldon (*see* ¶¶ 9-16), and at
4 the hearing. *See, e.g.*, Tr. at 10-0077, line 5 - 0080, line 12. It was also addressed in the wetland
5 mitigation explanation offered by Ecology and Port witnesses at the hearing before the Board. *See,*
6 *e.g.*, Tr. at 6-0167, line 19-21 (Stockdale: in-basin mitigation includes restoration and enhancement
7 of Vacca Farm); Tr. at 6-0198, line 21 - 0200, line 17 (Stockdale admits he recommended to Port
8 that Vacca Farm mitigation be termed enhancement, but NRMP puts part of it in restoration
9 category); Tr. at 10-0026, lines 7 - 14 (Kelley, discussing “restoration” of Vacca Farm); Tr. at 10-
10 0033, lines 5-11 (Kelley says mitigation plan will “restore” 3.3 acres of wetland on Vacca Farm site
11 which do not currently exist).

12
13 The excerpt relates directly to a matter at issue before the Board -- the status of Vacca Farm
14 -- and should be admitted.

15
16 **2. Page 56, lines 20-23:**

17 The Order, at p. 10, publishes Page 41, line 7, through page 66, line 15. However, the
18 redacted deposition transmitted with the Order crosses out page 56, lines 20-23.

19 **3. Page 66, line 16, to page 71, line 7:**

20 This excerpt discusses the FAA’s new “TRACON” radar facility, which is slated to be
21 constructed within the Third Runway Project site on land leased from the Port. Mr. Stockdale
22 acknowledges in this excerpt that it would be a several-acre facility composed of buildings and
23 parking lots, with impervious surfaces which would require stormwater management, yet it was
24 never reviewed by Ecology, and is not mentioned in the § 401 Certification. **AR 001018**

25 The Order excluded this excerpt on the grounds of relevance and lack of foundation,

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2 although no such objections were raised at the deposition. The excerpt is relevant to Issue No. 3,
3 which asks whether “the stated limitations on the temporal, operational, and geographic scope of
4 the Certification, including its limitation to “Port 404 projects,” violate the requirements of
5 Section 401 of the Clean Water Act and applicable state water quality law.”

6 **4. Page 82, line 25:**

7 The Order does not publish this line, but it is the first line of a question which continues onto
8 the following page, which is published, and is necessary to make the question fully intelligible. The
9 line is not crossed out in the Board-redacted deposition.

10
11 **5. Page 111, line 1, to page 112, line 9 (line 10⁵):**

12 This excerpt again concerns the TRACON facility.

13 **6. Page 117, line 15, to page 118, line 16.**

14 Mr. Stockdale testifies here about his request to the Port to make its documents available to
15 the public by putting them on line, and the fact that that suggestion was never implemented. It was
16 excluded on the basis of relevance.

17
18 However, its exclusion creates a misleading impression because, immediately following it,
19 at page 118, line 17, through page 119, line 3, is a counter-excerpt designated by Ecology, which
20 was admitted. Without the entire discussion, a misimpression is created: the admitted portion
21 discusses how responding to Public Disclosure Act requests for Port-submitted documents
22 supposedly eroded the time Ecology had to review the project. The previous, excluded testimony
23 describes how the Port refused to implement Mr. Stockdale’s suggestion that the Port make project
24 submissions available on-line, thus eliminating the need for Ecology staff to respond to Public
25

⁵ The excerpt should end at line 10 instead of line 9, since line 10 contains the answer to a question.

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2 Disclosure requests by copying them for the public.

3 **7. Page 126, line 19, to page 127, line 21:**

4 This excerpt was excluded on the ground that it is “misleading,” although no objection was
5 raised at the deposition. It is carved out of the middle of a discussion about political pressure, the
6 rest of which was admitted (p. 125, line 7, to p. 126, line 18; and page 127, line 22, to p. 129, line
7 2). Carving out and excluding this portion of the discussion affirmatively creates the inaccurate
8 impression that there was no pressure applied to Ecology. The excluded portion speaks of how the
9 Port complained to the Governor’s Office within minutes of a meeting between Port and Ecology
10 technical staff which Mr. Stockdale attended. It describes how Mr. Stockdale was then immediately
11 contacted on his cell phone by Gordon White regarding these complaints, even before he had time
12 to get back to his office.

14 **8. Page 129, line 17, to page 130, line 8/line 9:⁶**

15 This excerpt relates directly to the previous discussion about political pressure which was
16 admitted (with the exception of #7, discussed above). It was excluded on relevance grounds, yet
17 it continues the previous discussion which was admitted. Its exclusion creates an inaccurate
18 impression, because in the admitted passage immediately preceding it, Mr. Stockdale suggests
19 that one Ecology official, Mr. Hellwig, tried to shield him from political pressure. The excluded
20 passage, however, describes how Mr. Stockdale was called by another Ecology official, Gordon
21 White, within 20 minutes after a meeting with Port staff, because the Port had complained to the
22 Governor’s Office. To include page 127, line 22, to page 129, line 2, but exclude page 129, line
23 3 to page 130, line 8 (and exclude page 126, line 19, to page 127, line 21, discussed above) creates
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⁶ The Order has two listings: one through line 8, and one through line 9. Order at p. 5.

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2 a serious misimpression.

3 **9. Page 135, line 23, to page 136, line 25; and page 138, line 23, to page 139, line**
4 **11:**

5 These two excerpts constitute the beginning and end of a discussion about Ecology's first
6 choice for an outside wetland consultant, Dyanne Sheldon, why she was not hired, and why
7 Ecology instead hired Shannon & Wilson (Katie Walter). The Order excluded both excerpts on
8 grounds of relevancy.

9 The entire discussion runs from page 135, line 23, through page 139, line 11. The Order has
10 admitted page 137, line 1, through page 138, line 13 (Order at 10) -- i.e., the middle of the
11 discussion. By including the middle, but excluding the beginning and end of the discussion, the
12 remaining portion becomes misleading.

13
14 The entire discussion is relevant, because it confirms Ecology's acknowledgement of the
15 expertise of Dyanne Sheldon,⁷ whose expert opinions have been offered by ACC.⁸ It contradicts
16 hearing claims, cited above, that Ecology had assembled a technical team and was reviewing the
17 project without regard to pressure from the Port or the Governor.

18 **10. Page 142, line 19, to page 148, line 11:**

19 This excerpt was excluded on relevancy grounds. It is a continuation of the discussion about
20 why Shannon & Wilson were ultimately hired to perform wetland-related review instead of Dyanne
21 Sheldon, and reflects that the Port held the purse strings for Ecology's purported "independent"
22 outside wetlands reviewer.
23
24

25 ⁷ See, e.g., Prefiled Testimony of Dyanne Sheldon at Ex. A (curriculum vita); Tr. at 2-0194-0196 (Sheldon, regarding her expertise).

⁸ See Sheldon Prefiled Testimony, generally; Sheldon testimony at hearing (Day 2), generally.

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2 **11. Page 158, lines 1-3:**

3 The Order, at p. 10, publishes this excerpt (within Page 157, line 19, through page 158, line
4 11). However, the redacted deposition transmitted with the Order crosses out page 158, lines 1-3.

5 **C. Deposition of Ray Hellwig**

6 **1. Page 78, line 22, to page 86, line 13:**

7 This excerpt discusses a memo written by Mr. Hellwig to Governor Locke's Chief of Staff,
8 Joe Dear, about a meeting held on May 16, 2000, concerning, *inter alia*, the Port's application for a
9 401 certification as well as Governor Locke's reelection campaign, and phone calls and related
10 contacts between Mr. Hellwig and various parties leading up to Mr. Hellwig's preparation of the
11 memo. These again complete the partial picture painted by Ecology at trial as to the "team"
12 approach for which it requests deference.

13
14 The excluded excerpt also contains an admission by Mr. Hellwig -- as quoted from Mr.
15 Hellwig's own memo (Ex. 81) -- that, "We have advised the Port of Seattle, provided our
16 requirements are met, that this project can be permitted -- we have said that the technical issues are
17 not as complex as those associated with the Battle Mountain Gold project." This is significant
18 because the Board has published other portions of Mr. Hellwig's deposition -- page 120 through
19 page 21, line 22, and page 123, line 10 through page 125, line 7 -- where Mr. Hellwig discusses
20 Exhibit 86, a document entitled "Lessons Learned from Big Projects," put together by Ecology staff
21 in the aftermath of the Battle Mountain Gold decision, which listed points Ecology "should think
22 about ... so we can make a defensible decision"(p. 121, lines 20-21), including:

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25 A. Management should not make any commitments or give assurances to project applicants
regarding permit approval timelines or decisions without buy-in from appropriate project
staff.

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2 The Order redacted the testimony on the grounds that it called for speculation,
3 mischaracterized the witness' testimony, and/or was hearsay. However, the questions and answers
4 concerned a memo that the witness himself had written and conversations he himself had
5 participated in. It is anomalous to suggest that the witness can mischaracterize his own testimony,
6 or that it is hearsay for a witness to testify about a memo he wrote himself.
7

8 Moreover, the only objection raised by Ecology to this excerpt -- at page 84, line 24 -- was
9 relevance, which is not mentioned in the Order as a ground for excluding this excerpt.
10

11 **2. Page 109, line 7, to page 111, line 25:**

12 This excerpt, excluded on relevance grounds, concerns meetings among the Port, Ecology,
13 and members of the Governor's staff (e.g., Chief of Staff Joe Dear), with Mr. Hellwig
14 acknowledging that Joe Dear had no technical expertise regarding issues related to § 401
15 certifications. Again, this excerpt goes directly to Ecology's repeated claim during the hearing that
16 the Board should defer to Ecology's § 401 decision by an unpressured "team" of technical experts.
17

18 **3. Page 162, line 20:**

19 This line is listed as admitted in the Order (at p. 8), but crossed out in the redacted
20 deposition transmitted with the Order.

21 **4. Page 166, line 17, to page 167, line 17:**

22 This excerpt concerns Exhibit 91, which includes a letter dated September 28, 2000, from
23 Ecology Director Tom Fitzsimmons to Port of Seattle Executive Director Mic Dinsmore. That
24 letter outlines the process whereby the Port withdrew its previous (second) application in the face of
25 denial. The excluded excerpt discusses the fact that this letter was drafted during a meeting among,

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inter alia, Mr. Hellwig, the Port’s Executive Director Mic Dinsmore and the Governor’s Chief of Staff, about which Mr. Hellwig testifies, “We discussed commitments that would be appropriate from there forward and came up with some language, yes.” Page 167, lines 15-17.

The Order excluded this excerpt on relevance grounds. However, the excluded excerpt occurs in the midst of a longer discussion of the letter and the meeting at which it was drafted, the rest of which was admitted: excluding it carves out an important piece of the puzzle, leaving a misimpression as to the rest of the (admitted) discussion.

5. Page 182, line 25:

The Order does admit page 183, line 1, et seq. The question on page 183, line 1 begins on page 182, line 25. For that reason, page 182, line 25 should be admitted.

6. Page 200, lines 5-24:

The Order, at page 8, lists one of the excerpts from Mr. Hellwig’s deposition to be admitted as “Page 199, line 6 through page 200, line 4.” However, redacted deposition transmitted with the Order admits through line 24. Further, there was no objection to inclusion of page 200, lines 5-24.

7. Page 249, line 15:

The Order, at page 8, admits “Page 226, line 1 through page 249, line 15. However, line 15 of page 249 is crossed out in the redacted deposition transmitted with the Order.

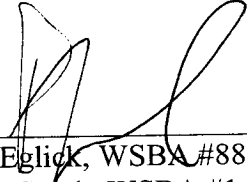
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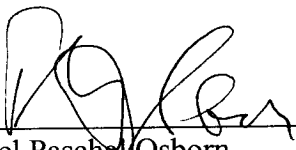
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For all the reasons discussed above, ACC requests that the Board enter an order publishing the noted deposition excerpts and correcting the inconsistencies between the Order Publishing Depositions and the redacted depositions.

DATED this 21 day of May, 2002.

HELSELL FETTERMAN LLP

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**HELSELL
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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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

No. 01-160

CERTIFICATE OF SERVICE

Appellant,)

v.)

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

Respondents.)

I, Michael Dennis, 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 May 16, 2002, I sent via Federal Express, a true and correct copy of ACC's Motion to
the Board for Correction, Clarification, and/or Partial Reconsideration of Orders Publishing
Certain Portions of Depositions of Ecology Managers and CR 30(b)(6) Designated Witnesses to:

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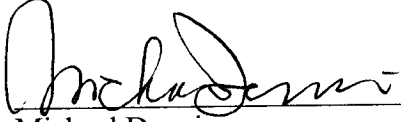
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21 day of May, 2002, at Seattle, Washington.


Michael Dennis

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