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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 TO REDACT TESTIMONY
OF PAUL FENDT, P.E.

ORIGINAL

The Port of Seattle ("Port") submits the following response to ACC's motion to redact the testimony of Paul Fendt.

1. The Calculations That Supported the Fendt Testimony Were Not Undertaken After the Discovery Cutoff Or In Response to Kelly Whiting's February 19 Comments on the Low Flow Plan.

With its motion, ACC seeks to strike a single sentence and one exhibit from the testimony of Paul Fendt. ACC grounds its motion on the contention that the work that formed the basis for that statement and the exhibit was performed after the discovery cutoff and in response to the February 19, 2002 comments of Kelly Whiting.

ACC is incorrect. Mr. Whiting's preliminary comments on the December Low Flow Plan were relayed by Mr. Whiting to Keith Smith on February 12, 2002 (and were in turn relayed by Mr. Smith to Mr. Fendt). In response to Mr. Smith's report, Mr. Fendt updated the analysis of the low flow period for

PORT OF SEATTLE'S RESPONSE TO ACC'S MOTION TO
REDACT TESTIMONY OF PAUL S. FENDT - 1

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1 Walker Creek before his February 19 meeting with Kelly Whiting. He also prepared the document that
2 was attached to his testimony as Exhibit C before the February 19 meeting. See Fifth Declaration of
3 Paul S. Fendt, P.E., ¶4.

4 This fact is significant because the Board's evidentiary rulings during the hearing excluded the
5 introduction of calculations, testimony or documents that were prepared specifically in response to the
6 Kelly Whiting's February 19, 2002 comments on the low flow plan and which were disclosed after the
7 discovery cutoff. As Mr. Fendt makes clear in his declaration, he had undertaken his review of the
8 Walker Creek low flow period prior to even meeting with Mr. Whiting on February 19.

9 **2. Exhibit C to the Fendt Testimony Was Not Prepared After the Discovery Cutoff.**

10 ACC has also specifically grounded its motion on a claim that Mr. Fendt's testimony "relies
11 upon a version of the Low Flow report which was prepared **after** the discovery cutoff date of February
12 28, 2002." ACC Motion at 3:21-23 (emphasis in original).

13 Here again, ACC's is incorrect. As noted above, the calculations that formed the basis for the
14 statements in ¶42 of Mr. Fendt's testimony were not only performed prior to the discovery cutoff, but
15 were also prepared in anticipation of the actual receipt of Mr. Whiting's comments on February 19.
16 Similarly, Exhibit C to the Fendt testimony was prepared prior to the February 19 meeting with Mr.
17 Whiting. See 5th Fendt Dec., ¶4. While that document was not submitted to Mr. Whiting until March 6,
18 along with a number of other responses to Mr. Whiting's comments, the work reflecting the Walker
19 Creek low flow calculations (including preparation of the document) took place prior to the February 19
20 meeting. 5th Fendt Dec., ¶5.

21 ACC is correct that Exhibit C to the Fendt Testimony constitutes a replacement page to the
22 December 2001 Low Flow Plan. However, ACC's assertion that any revisions took place after the
23 discovery cutoff is inaccurate. Mr. Whiting's comments (quoted in ACC's motion) bear this out. Mr.
24 Whiting states that, as of February 19, the "Indication is that the problem has been researched and the
25 low flow frequency analysis included in the 12/01 low flow report is inaccurate." ACC Motion at 5:12-
26

1 13 (quoting Mr. Whiting's comments). This statement reflects what Mr. Whiting was told at the
2 February meeting – based on Mr. Whiting's preliminary communications with Keith Smith, Mr. Fendt
3 and members of the low flow team had already revisited the Walker Creek low flow period and had
4 concluded that the results that had been previously reflected in the earlier July 2001 Low Flow Report
5 (e.g., that 44 of 47 low flow periods occur between August 7 and November 9) were actually correct.

6 **3. Conclusion**


7 ACC's motion is grounded on a claim that the Walker Creek calculations and the preparation of
8 Exhibit C to the Fendt testimony took place "after the February 28 Whiting deposition, and after the
9 Board's 2/29/02 deadline for use of additional documents relating to the Low Flow Plan." ACC Motion
10 at 6:23-7:1 (emphasis in original).

11 As the 5th Fendt Declaration makes clear, the underlying premise of ACC's motion is incorrect.
12 The calculations that form the basis for Mr. Fendt's statements in ¶42 of his testimony were undertaken
13 prior to February 28; in fact they were undertaken prior to the meeting on February 19 where Mr.
14 Whiting's comments were delivered. Likewise, the document attached as Exhibit C to the Fendt
15 testimony was prepared prior to February 19. That document, along with others, was delivered to King
16 County for the first time on March 6; ACC received it the very next day when Mr. Fendt's testimony
17 was served on ACC.


18 Because ACC's motion to redact the Fendt testimony is grounded on a incorrect factual premise,
19 the motion must be denied.

20 Respectfully submitted this 17th day of April, 2002.

21 PORT OF SEATTLE

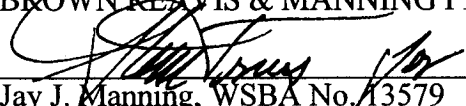
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