

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
Appellant,) PCHB 01-160
CITIZENS AGAINST SEATAC) ORDER GRANTING IN-PART
EXPANSION,) APPELLANT'S MOTION IN LIMINE TO
Intervenor,) EXCLUDE THE TESTIMONY OF DAVE
v.) GARLAND
STATE OF WASHINGTON,)
DEPARTMENT OF ECOLOGY and THE)
PORT OF SEATTLE,)
Respondents.)

On March 21, 2002, at 1:00 p.m., during the hearing on the merits, the Board entered its ruling on appellant ACC's Motion In Limine to Exclude the Testimony of Dave Garland. Kaleen Cottingham presided for the Board. The following reflects the decisions made after reviewing the written submittals from all parties:

RULING ON MOTION TO EXCLUDE THE TESTIMONY OF DAVE GARLAND

1. In its ruling on Appellant's Motion To Exclude Late-Produced Reports the Board stated that the operative intent of the pre-hearing order, as evidenced by the transcript of the hearing, was to prevent the late presentation of those formal aspects of the §401 conditions.

2. On the instant motion, the March 6, 2002 report prepared by Dave Garland on the December 2001 low flow plan was "not a report or plan prepared or expected to be prepared

1 pursuant to the §401 certification.” Accordingly, failure to produce this report by the February 1,
2 2002 deadline was not a violation of the pre-hearing order.

3 3. Discovery in this case has been governed in part by the basic discovery rules,
4 including CR 26(e)(1)(B) the duty to supplement interrogatory responses regarding subject
5 matter of expert witness testimony. In this matter ACC made a series of written and in-person
6 inquiries to Ecology's counsel to determine whether Mr. Garland would testify with regard to the
7 December 2001 low flow plan. Ecology made no response. Ecology even failed to respond to
8 ACC's letter of March 4, 2002 requesting to depose Mr. Garland, "in advance of hearing
9 regarding his review of the low flow plan." This refusal of Ecology to respond in any clear
10 manner, is a violation of the fundamental duty under the civil rules of discovery requiring a party
11 to supplement and update information it has provided.

12 4. Normally the remedy for a discovery violation of this sort would be to allow time for
13 ACC to depose Mr. Garland on his review of the December 2001 low flow plan. However, in
14 the way this case has developed, ACC's three key expert witnesses (Mr. Rozeboom, Dr. Leytham
15 and Dr. Lucia) have already testified. In presenting its case ACC has stated its need to "obtain
16 analysis" from these experts, on Mr. Garland's review, within the framework of their professional
17 schedules and obligations. Since ACC carries the burden of proof in this matter, the additional
18 burden of this violation is particularly egregious and prejudicial.

19 5. This means more time will not be a sufficient remedy. Therefore, the remedy for this
20 discovery rule violation will be the exclusion of any testimony by Mr. Dave Garland on any
21 analysis, findings or conclusions related to his review of the December 2001 low flow plan.

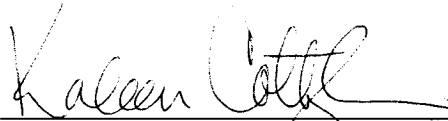
1 However, Mr. Garland may testify on any subject or issue upon which appellant's had the
2 opportunity to depose. Any reference to the excluded subject matter shall constitute the basis for
3 an objection, which the Board will sustain when asserted.

4 **ORDER**

5 The Board GRANTS IN-PART ACC's Motion In Limine to Exclude the Testimony of
6 Dave Garland.

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8 SO ORDERED this 21st day of March, 2002.

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10 **POLLUTION CONTROL HEARINGS BOARD**

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13 **KALEEN COTTINGHAM,**
14 Presiding