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MAR 18 2002

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON ENVIRONMENTAL
HEARINGS OFFICE

1 AIRPORT COMMUNITIES COALITION,)
2) PCHB No. 01-160
3 Appellant,)
4 v.) APPELLANTS' REPLY ON MOTION IN
5) LIMINE TO EXCLUDE LATE-PRODUCED
6 STATE OF WASHINGTON,) PLANS AND REPORTS
7 DEPARTMENT OF ECOLOGY; and)
8 THE PORT OF SEATTLE,)
9 Respondents.)

10 Exclusion of the Port and Ecology's post February 1, 2002, plans and reports
11 identified in Appellants' Motion in Limine is required under the plain language of the Board's
12 October 30 Pre-Hearing Order:

13 For those plans or reports expected to be completed between November 16, 2001 and
14 February 1, 2002, Respondents shall identify the estimated completion dates. If those
15 plans and reports are completed on or before February 1, 2002, Respondents shall
16 provide copies to Appellant ACC when complete. Ecology and the Port are prohibited
from relying at the hearing upon any plan or report prepared after November 15, 2001
unless such plan or report is noted on the above-required list. Even if noted on the list,
Ecology and the Port are prohibited from relying at the hearing upon any plan or
report prepared after February 1, 2002.¹

17 Not surprisingly, the Port's response brief fails to quote or refer to the underlined portion of
18 the Pre-Hearing Order. It was incorporated into the Pre-Hearing Order to keep the 401
19 Certification from becoming a moving target and avoid problems that had been encountered
20 in other appeals of 401 certifications for significant projects, such as in *Battle Mountain Gold*
21 (*"BMG"*) where the project proponents continued to submit "last minute revisions" to stream
22 flow depletion studies and mitigation plans.²

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¹ October 30, 2001, Pre-Hearing Order at p. 4 (emphasis added).

² *Okanogan Highlands Alliance, et al., v. Department of Ecology and Battle Mountain Gold Company*, PCHB Nos. 97-146, -182, -183, -186; and 99-019, Final Findings of Fact, Conclusions of Law and Order (January 19, 2000) at Finding of Fact 14.

1 The Board's October 30, 2001, Order struck a compromise between the positions of
2 the parties. Appellants argued that "anything after that cutoff date of November 15 cannot be
3 relied upon at the March 18 hearing for purposes of trying to establish reasonable assurance".³
4 Respondents argued against a cutoff date based upon the fact that the hearing beginning
5 March 18 is a "de novo proceeding to the Board."⁴

6 In its memorandum (pp. 3-4) the Port quotes the pre-hearing conference transcript
7 where Ms. Marchioro questioned whether the cutoff date would apply to expert's reports
8 "unless we are going to have an expert report identification date."⁵ While Ms. Cottingham
9 said "I would agree with that", she then asked Mr. Stock "you're looking at plans and the
10 reports that are required under the 401?"⁶ In response, Mr. Stock stated: "I am looking at
11 that, I am also thinking about the *BMG* case where, on the eve of the hearing, the project
12 proponent submitted additional plans, and ultimately the Board used that as evidence that
13 there wasn't reasonable assurance at the time the 401 was issued."⁷ Ms. Cottingham then
14 stated "Well, I think if we do the February 1st, that gives you a month and a half to do some
15 additional follow-up."⁸ Ms. Osborn then asked "for the discovery cutoff date?"⁹ to which
16 Ms. Cottingham responded "we haven't even gotten to all that; it can be linked up later."¹⁰
17 Discovery cutoff and the cutoff for plans and reports required under the 401 were, in fact,
18 linked up in the Board's Order:
19

20 Ecology and the Port are prohibited from relying at the hearing upon any plan or
21

22 ³ See Transcript of October 15 Hearing at p. 9-10 (Witek Declaration in Support of Motion in Limine to Exclude
23 Late-Produced Plans and Reports, Exhibit A).

24 ⁴ Id. at p. 15.

25 ⁵ Id. at p. 28.

⁶ Id.

⁷ Id.

⁸ Id. at 29.

⁹ Id.

¹⁰ Id.

report prepared after November 15, 2001 unless such plan or report is noted on the above-required list. Even if noted on the list, Ecology and the Port are prohibited from relying at the hearing upon any plan or report prepared after February 1, 2002.¹¹

The Port (pp. 1-2) attempts to argue that the February 1 cutoff date applies only to “those plans and reports prepared or expected to be prepared ‘pursuant to the § 401 Certification.’”

This would undercut its purpose and render meaningless the Board’s order which states that “even if noted on the [November 15 plans and reports] list, Ecology and the Port are prohibited from relying on any plan or report prepared after February 1, 2002.” (Emphasis added.)

The S.S. Papodopolous Embankment Report¹² was not produced until after close of business on Friday February 15 -- two weeks after the February 1 cut-off. The Port (at p. 4-5) emphasizes that ACC counsel was given notice on February 7 (again, after the February 1 cut-off) that Mr. Riley, of S.S. Papodopolous, was working on an embankment model and report, and that the Port offered to reschedule Mr. Riley’s deposition.¹³ This “offer” must be considered in context. In his deposition, Mr. Riley indicated that he was asked to prepare his report – which had not been listed on November 15 (as required) -- sometime in early January 2002.¹⁴ Thus, the Port knew then that it would be offering a non-disclosed report based upon Mr. Riley’s new modeling and yet did not disclose it until February 7 (three working days before Mr. Riley’s February 12 deposition). By then it was apparent to the Port that it could

¹¹ October 30, 2001, Pre-Hearing Order at p. 4. (Emphasis added.)

¹² See Ecology proposed Exhibit No. 1320 “Seattle-Tacoma International Airport Third Runway Embankment Fill Water-Quality and Transport Analysis” dated February 15, 2002.

¹³ The Port (p. 6) also claims that the Pre-Hearing Order should not be strictly enforced against the Port because ACC “added nearly 100 documents to it’s final exhibit list after [February 20].” At the March 12, 2002, Pre-hearing Conference, Port and Ecology counsel admitted that 19 of the 98 newly added documents were produced to ACC after February 20, 2002 in response to Public Disclosure Act requests. Respondents withdrew their untimeliness objections to these exhibits. The majority, if not all, of the remaining 79 documents were laboriously culled from the 35 banker-boxes of unvariegated Port discovery documents, which the Port supplemented throughout February.

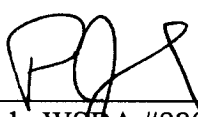
¹⁴ Riley Deposition, February 12, 2002, Transcript at p. 19 (Exhibit D to Witek Declaration).

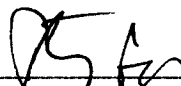
not have a completed report to Appellants prior to Mr. Riley's deposition, which was, again,
two weeks after the February 1 cut-off. The Port's "offer" on February 7 to put off Mr.
Riley's deposition would have destroyed a tightly orchestrated schedule (40 depositions) to
accommodate a mythical late report that the Port had never listed and had not produced.¹⁵

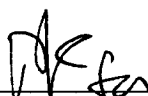
Although a handful of documents used in Mr. Riley's model were produced the day of
his deposition, the full report was not produced until after 6:00 p.m. on February 15. Further,
the Port has yet to produce the electronic input data which Mr. Riley modeled, which are
essential to evaluate the model assumptions and their impact on the report's conclusions.¹⁶
Once this information was obtained, a full evaluation of the model would take upward of a
month. Id.

Clearly, Appellants are prejudiced by the Port's untimely submittal of the Riley
Embankment report, as well as the 17 other plans and reports identified in Appellants'
Motion. The remedy established in the October 30, Pre-Hearing Order is that "Ecology and
the Port are prohibited from relying at the hearing" on these plans and reports.

DATED this 17 day of March, 2002.

By: 
Peter J. Eglick, WSBA #8809
Kevin L. Stock, WSBA #14541
Michael P. Witek, WSBA #26598
Attorneys for Respondent
Airport Communities Coalition


Rachael Paschal Osborn
WSBA # 21618
Attorney for Respondent
Airport Communities Coalition

By 
Richard A. Poulin WSBA #27782
Attorneys for Citizens Against
Sea-Tac Expansion

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¹⁵ Id.

¹⁶ Lucia Declaration in support of Appellants' Motion in Limine to Exclude Late File Reports at ¶ 4.

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)	
	)	No. 01-160
Appellant,)	
	)	DECLARATION OF PATRICK C.
v.	)	LUCIA IN SUPPORT OF
	)	APPELLANTS' MOTION IN LIMINE
STATE OF WASHINGTON,	)	TO EXCLUDE LATE FILED REPORTS
DEPARTMENT OF ECOLOGY; and)	
THE PORT OF SEATTLE,	)	(Section 401 Certification No.
	)	1996-4-02325 and CZMA concurrency
Respondents.	)	statement, Issued August 10, 2001,
_____	)	Reissued September 21, 2001, under No.
	)	1996-4-02325 (Amended-1))

Patrick C. Lucia declares as follows:

1. I am over the age of 18, am competent to testify, and have personal knowledge of the facts stated herein.

2. I have seen a copy of the Papadopolous report dated February 15, 2002, entitled "Seattle-Tacoma International Airport Third Runway Embankment Fill Water-Quality and Transport Analysis."

3. Based upon my preliminary review, I have several concerns about the underlying assumptions upon which the model relies.

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DECLARATION OF PAT LUCIA IN SUPPORT
OF APPELLANTS' MOTION IN LIMINE TO
EXCLUDE LATE FILED REPORTS- 1

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

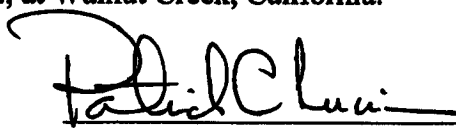
Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201

4. In order to fully evaluate these assumptions and the impact of those assumptions on the conclusions stated in the report, I would need to see the electronic input data used for the model and would have to take two to four weeks to analyze the model with my colleagues.

5. I have not been provided a copy of the electronic data entered into the model.

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

DATED this 15 day of March, 2002, at Walnut Creek, California.


Patrick C. Lucia Ph.D.

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DECLARATION OF PAT LUCIA IN SUPPORT
OF APPELLANTS' MOTION IN LIMINE TO
EXCLUDE LATE FILED REPORTS- 2

HELSELL FETTERMAN LLP
1500 Puget Sound Plaza
1325 Fourth Avenue
Seattle, WA 98101-2509

Rachael Paschal Osborn
Attorney at Law
2421 West Mission Avenue
Spokane, WA 99201