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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

ENVIRONMENTAL  
HEARINGS OFFICE

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2	AIRPORT COMMUNITIES COALITION,	)	
3		)	PCHB No. 01-160
4	Appellant,	)	
5	v.	)	APPELLANTS' REPLY BRIEF IN
6	STATE OF WASHINGTON,	)	SUPPORT OF MOTION IN LIMINE TO
7	DEPARTMENT OF ECOLOGY; and	)	EXCLUDE TESTIMONY OF ECOLOGY
8	THE PORT OF SEATTLE,	)	WITNESS DAVE GARLAND
9		)	
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Ecology issued 401 certifications dated August 10 and again on September 21. In each instance it certified that it had at the time of issuance reasonable assurance that Water Quality Standards would not be violated. Ecology and the Port nevertheless asked the Board to allow them to continue to produce and offer new reports and plans supporting the 401 for a full half a year after their issuance. To compensate for the disadvantage this created for Appellants, the Board set a February 1, 2002 cut-off date for the creation of new reports and plans, and allowed a special discovery period, ending February 28, for Appellants to discover evidence and witness opinions relating to post-September 21 documents which were properly disclosed and produced.

Discovery relating to Ecology witness Kelly Whiting (from King County DNR) shows how this process worked. In his original deposition on December 20, 2001 Mr. Whiting indicated he intended to testify regarding the Port's 12/17/01 Low Flow Plan but had not yet completed his review. Pursuant to the Board's Pre-Hearing Order, Mr. Whiting's deposition was continued until February 28, 2002, the last day of discovery. The

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1 critical first step in this process was the acknowledgment by Mr. Whiting and Ecology's  
2 attorneys that he **would** in fact be reviewing and testifying about the Low Flow Plan.

3 In contrast, both Ecology witness Dave Garland and Ecology counsel professed not  
4 to know at the time of his January 9, 2002 deposition whether Mr. Garland would later  
5 review and testify about the Port's new December 2001 Low Flow Plan. *See Declaration of*  
6 *Rachael Paschal Osborn (3/13/02), Att. 4 ("Osborn Decl.")*. ACC was led to believe by the  
7 Garland deposition that any PCHB testimony by Mr. Garland would be on based the work  
8 Mr. Garland had done in the Spring 2001 on the Port's prior Low Flow Plan.

9 ACC, however, did not simply let the matter rest. Instead, ACC counsel made a  
10 series of written and in-person inquiries to Ecology's attorney, Tom Young. ACC counsel  
11 sent two letters and an e-mail, requesting that Ecology advise regarding Mr. Garland's  
12 testimony. Ecology made no response. ACC counsel asked Ecology's counsel **twice, in**  
13 **face-to-face meetings**, whether Mr. Garland would testify about the Low Flow Plan. Both  
14 times the reply was "I don't know, I'll get back to you." Ecology counsel never got back to  
15 ACC. *See Osborn Decl.*

16 Beyond sheer lack of courtesy, Ecology has failed to adhere to basic discovery rules,  
17 particularly CR 26(e)(1)(B) (duty to supplement interrogatory responses regarding subject  
18 matter of expert witness testimony). Ecology's failure also violates the Board's Pre-Hearing  
19 Order at 4-5 ("Ecology and the Port are prohibited from relying at the hearing upon any plan  
20 or report prepared after February 1, 2002. . . [T]he parties shall be allowed additional  
21 discovery on documents identified on the list for completion between November 16 and  
22 February 1<sup>st</sup>. Such additional discovery shall be allowed until February 28, 2002.").

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1 The ambiguity in Ecology's responses to interrogatories combined with ACC's  
2 multiple, straightforward inquiries, put the burden squarely on Ecology to inform ACC  
3 whether Mr. Garland's testimony would extend to the December 2001 Low Flow Plan -- just  
4 as Ecology had done with respect to Mr. Whiting. ACC was more than diligent in  
5 attempting to obtain an answer to a simple question. Ecology's counsel needed only to  
6 confirm that "yes, Mr. Garland will testify regarding the Low Flow Plan" and a continuation  
7 of the deposition would have been scheduled. Instead, Ecology refused to respond  
8 substantively up until -- **and beyond** -- the very last day of discovery cutoff.<sup>1</sup>

9  
10 The responsibility for Mr. Garland's failure to start his review of the Port's  
11 December 17 Low Flow Plan until after his January 9 deposition and his failure to complete  
12 his review until March 6 lies with Ecology, not ACC. Ecology had a duty to inform ACC  
13 whether Mr. Garland would testify on this matter in time to discovery before February 28. It  
14 did not do so.

15 Ecology's actions have prejudiced Appellants, who carry the burden of proof in this  
16 proceeding and who cannot be expected to conduct a discovery deposition in front of the  
17 PCHB itself, consuming precious hearing time. Prior discovery regarding the basis for Mr.  
18 Garland's testimony is important not only for purposes of cross-examination before the  
19 PCHB, but also to obtain analysis from and inform ACC's expert witnesses who will testify  
20 regarding the Low Flow Plan. Mr. Garland's pre-filed testimony on the subject of the Low  
21 Flow Plan relates to the testimony of ACC witnesses William Rozeboom, Dr. Malcolm  
22 Leytham and Dr. Patrick Lucia, who will testify during the week of March 18. It is not  
23  
24

25 <sup>1</sup> Ecology's attempt to shift the blame for its inexcusable lapse is ludicrous. ACC did attempt to consult with Ecology attorneys seven times -- in its interrogatory questions, during Mr. Garland's deposition, via letters and e-mail, and in person. See 1<sup>st</sup> Osborn Decl

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1 possible to schedule a deposition, obtain a transcript, command ACC experts (who have  
2 other professional obligations) to review that transcript, and then prepare and provide  
3 testimony to the Board regarding Ecology's last-minute review of the Port's latest Low Flow  
4 Plan. Nor is it possible to conduct informed cross-examination of Mr. Garland on that basis.

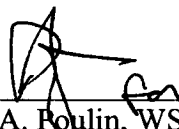
5 The purpose of discovery is to provide an orderly process by which parties may  
6 obtain information about opposing witnesses and evidence in a timely fashion.<sup>2</sup> ACC's  
7 counsel made every reasonable effort to obtain disclosure from Ecology of the scope and  
8 content of Mr. Garland's testimony. Ecology made no effort whatever to respond to ACC.  
9 This is clear abuse of the discovery process. The appropriate remedy is exclusion of  
10 testimony from Mr. Garland.  
11

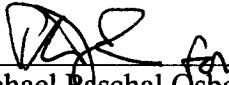
12 DATED this 17<sup>th</sup> day of March, 2002.

13 HELSELL FETTERMAN LLP

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20  
21  
22 <sup>2</sup> "The *purpose of discovery* is to provide a mechanism for making relevant information  
23 available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is  
24 essential to proper litigation." Hickman v. Taylor, 329 U.S. 495 (1947). Thus the spirit of the rules is  
25 violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the  
facts and illuminate the issues by . . . evasive responses."

*Washington State Physicians Insurance Exchange & Association v. Fisons Corp.*, 122 Wash. 2d 299, 341, 858  
P.2d 1054 (1993) (citations omitted); *Cox v. K-Mart Corp.*, 107 Wn.App. 1036, \_\_\_, \_\_\_ P.3d \_\_\_ (2001)  
(exclusion of testimony is appropriate when a party violates a scheduling order without reasonable excuse)

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APPELLANTS' MOTION IN LIMINE TO  
EXCLUDE TESTIMONY FROM DAVE GARLAND - 4

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