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ENVIRONMENTAL
HEARINGS OFFICE

**BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON**

AIRPORT COMMUNITIES
COALITION,

Appellant,

CITIZENS AGAINST SEA-TAC
EXPANSION,

Intervenor/Appellant,

v.

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

Respondents.

PCHB No. 01-160

ECOLOGY'S RESPONSE TO ACC'S
MOTION TO EXCLUDE
TESTIMONY FROM DAVE
GARLAND

I. INTRODUCTION

ACC has filed a motion in limine to exclude the testimony of Dave Garland on the grounds that ACC allegedly was unaware that Mr. Garland would be testifying regarding the Port's December 2001 Low Flow Plan. This motion should be denied. Contrary to ACC's claims, it has long been aware that Mr. Garland was reviewing that plan and would be offering testimony regarding his review. Moreover, ACC has had, and continues to have, the opportunity to depose Mr. Garland regarding his testimony.

AR 002201

ORIGINAL

1 **II. STATEMENT OF FACTS**

2 Mr. Garland's answers to interrogatories specifically state that he will be testifying
3 regarding "his review of the integration of the groundwater modeling performed by the Port for
4 the embankment fill as it relates to the Port's low flow mitigation plan." See Ex. A attached to
5 Declaration of Rachel Pascal Osborne in Support of ACC's Motion in Limine. ACC deposed
6 Mr. Garland on January 9, 2002. Ex. C attached to Declaration of Rachel Pascal Osborne. At
7 his deposition, Mr. Garland testified regarding his review of the Port's groundwater modeling
8 and stated that he thought he would be reviewing the Port's 2001 Low Flow Plan. *Id.* Other
9 witnesses also testified at deposition that Mr. Garland was reviewing the December 2001 Low
10 Flow Plan, including Ann Kenny on February 20, 2002, and Kelly Whiting on February 28,
11 2002. Exs. F & H attached to Declaration of Rachel Pascal Osborne. In light of this
12 testimony, ACC cannot seriously contend that it was unaware of Mr. Garland's role in the
13 project or his expected testimony.

14 ACC complains that Mr. Garland's pre-filed testimony relies in part on a report
15 prepared after February 1, 2002. This complaint is the subject of another ACC motion in
16 limine to which Ecology and the Port will be responding separately. As explained in those
17 responses, Mr. Garland's memo to Ann Kenny dated March 6, 2002, which he mentions once
18 in his testimony, does not constitute a "plan or report" within the meaning of the Board's pre-
19 hearing order. Nor does Mr. Garland's testimony rely on the memo dated March 6. Garland
20 Testimony, ¶ 4. His testimony simply says that he documented his reviews in memos to Ann
21 Kenny dated, among other dates, March 6. He makes no further mention of this memo.
22 ACC's attempt to convert a memo into a "plan or report" subject to exclusion from evidence is
23 unavailing.

24 ACC also complains that Mr. Garland was not made available for deposition. This
25 complaint is unfounded. ACC deposed Mr. Garland. ACC apparently intended to depose him
26 again regarding his review of the December 2001 Low Flow Plan. Mr. Garland, however, did

1 not complete his review of the December 2001 Low Flow Plan until on or about March 6, as is
2 evident from his testimony. Since March 6, Mr. Garland has been and continues to be
3 available for deposition but ACC has made no effort to contact counsel for Ecology to
4 schedule his deposition. ACC made no mention of a desire to depose Mr. Garland at the
5 evidentiary conference on March 12. There was no discovery violation.

6 III. AUTHORITY AND ARGUMENT

7 A. ACC Is Not Entitled To Exclude Mr. Garland's Testimony

8 Exclusion of testimony based on an alleged failure to disclose the testimony is proper
9 only upon a showing of "intentional nondisclosure, willful violation of a court order or other
10 unconscionable conduct." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 83, 877 P.2d 703 (1994)
11 (citing cases) *aff'd*, 127 Wn.2d 401 (1995). Before excluding testimony, the court must
12 consider other options. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 497, 933 P.2d 1036
13 (1997).

14 Here, exclusion of Mr. Garland's testimony is improper. ACC has made no showing
15 whatsoever of intentional nondisclosure, willful violation of a court order, or any other
16 misconduct. Mr. Garland has been listed as a witness on Ecology's witness lists, he has been
17 deposed, the substance of his testimony has been identified in interrogatory answers and
18 supplemental interrogatory answers, and during his deposition. Counsel cannot legitimately
19 claim any unfair surprise.

20 The remedy here, if any is needed, is to permit ACC to cross-examine Mr. Garland
21 regarding his review of the December 2001 Low Flow Plan. Under the Board's third pre-
22 hearing order, ACC can cross-examine Mr. Garland regarding his review as if on direct exam.
23 Alternatively, ACC could take Mr. Garland's deposition before he testifies. Such a deposition
24 would entirely remove any prejudice to ACC from Mr. Garland's testimony. Given these
25 options, striking his testimony is inappropriately extreme.

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1 **B. ACC Has Not Complied With The Board's Pre-Hearing Order In Filing This**
2 **Motion**

3 The Board's pre-hearing order in this matter requires the parties to attempt to resolve
4 discovery disputes among themselves without filing discovery motions and requires the parties
5 to file affidavits documenting their efforts before filing a motion. ACC has not complied with
6 this requirement.


7 This matter could have been resolved with a phone call. Upon receiving Mr. Garland's
8 pre-filed testimony, ACC could have contacted counsel for Ecology and scheduled his
9 deposition. Instead, ACC waited a week and then filed this motion two days before the start of
10 trial. ACC has not made a good faith effort to resolve this issue and its motion should be
11 denied on that basis alone. *See Rudolph v. Empirical Research Systems*, 107 Wn. App. 861,
12 867 P.3d 813 (2001) (faxed letter does not satisfy requirement to confer under CR 26(i)).

13 **IV. CONCLUSION**

14 For the reasons stated above, ACC's motion to exclude the testimony of Dave Garland
15 should be denied.

16 DATED this 15 day of March, 2002.

17 CHRISTINE O. GREGOIRE
18 Attorney General

19 
20 JOAN M. MARCHIORO, WSBA # 19250
21 THOMAS J. YOUNG, WSBA # 17366
22 JEFF B. KRAY, WSBA # 22174
23 Assistant Attorneys General

24 Attorneys for Respondent
25 State of Washington
26 Department of Ecology
(360) 586-6770

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