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ENVIRONMENTAL  
HEARINGS OFFICE

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 APPELLANTS' MOTION IN  
LIMINE TO EXCLUDE "LATE-  
PRODUCED" PLANS AND  
REPORTS**

Appellants ACC and CASE base their motion to exclude 17 exhibits on a highly selective and inaccurate reading of the Board's prehearing order and of the transcript from the prehearing conference that preceded issuance of that order. As is clear from a close review of the prehearing order and the transcript from the conference, the Board has already specifically rejected the position taken in Appellants' motion. None of the exhibits they seek to exclude are "untimely" under the Board's order. Appellant's motion should be denied.

In its October 30, 2001 prehearing order, the Board required Ecology and the Port to identify certain plans and reports by November 15, 2001, and to complete those plans and reports by February 1, 2002. These deadlines do not apply to *all* plans and reports, as Appellants contend, but to a very specific subset: those plans and reports prepared or expected to be

PORT'S RESPONSE TO APPELLANT'S MOTION IN LIMINE  
TO EXCLUDE "LATE-PRODUCED" PLANS AND REPORTS - 1

**FOSTER PEPPER & SHEFELMAN PLLC**  
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206-447-4400

**AR 002212**

1 prepared "pursuant to the §401 Certification." None of the 17 documents that Appellants seek to  
2 exclude were prepared "pursuant to the §401 Certification," and consequently none should be  
3 excluded. In fact, many of the 17 documents that Appellants seek to exclude are neither "plans"  
4 nor "reports." Several of them are figures (documents 1-13) or compilations of analytical data  
5 (documents 8 and 9). Others include a memorandum containing comments (document 14) and  
6 an interlocal agreement between the Port and Ecology (document 17).  
7

8 Appellants quote the relevant provision from the Board's prehearing order, but they  
9 ignore the language that limits the plans and reports to which the identification and completion  
10 deadlines apply. The relevant provision states in part as follows:

11 On or before November 15, 2001, respondents Ecology and the Port shall identify  
12 all plans and reports (other than ministerial documents) *prepared or expected to*  
13 *be prepared pursuant to the §401 Certification* and which either Ecology or the  
14 Port intends to rely upon at the hearing. For those plans and reports that are  
15 complete as of November 15, 2001, Respondents shall provide copies to  
16 Appellant ACC on or before November 15, 2001. For those plans or reports  
17 expected to be completed between November 16, 2001 and February 1, 2002,  
18 Respondents shall identify the expected completion dates.

19 October 30, 2001 Prehearing Order at 4 (emphasis added).  
20

21 During the prehearing conference on October 15, 2001, the parties discussed at length the  
22 scope of the requirement to identify and complete certain plans and reports. One of the attorneys  
23 for ACC took the position that Appellants now advocate in their motion, that any documents the  
24 Port or Ecology intended to rely upon at the hearing should be disclosed by November 15, 2001.<sup>1</sup>  
25 Counsel for the Port and Ecology objected to this, and the parties engaged in a lengthy debate to  
26 precisely define which documents would be subject to the special deadlines for identification and

---

<sup>1</sup> Mr. Stock made this suggestion at page 9, lines 23-25 and page 10, line 1; at page 15, line 25 and page 16, lines 1-5; and page 25, lines 13-22 of the transcript. See Exhibit B to the Declaration of Michael P. Witek in Support of Appellants' Motion in Limine.

1 completion. After extensive discussion<sup>2</sup> – during which one of ACC’s attorneys stated at least  
2 twice that these deadlines should apply only to plans and reports submitted pursuant to a  
3 requirement of the §401 Certification<sup>3</sup> – the Board resolved the issue as reported in the following  
4 colloquy:

5 MS. COTTINGHAM: Here’s what I’ve written down. And a definition of plans, I  
6 think I heard you then broaden it this last go-round, but I  
7 wrote down –

8 MR. STOCK: That wasn’t my intent.

9 MS. COTTINGHAM: Well, you said reports.

10 MR. STOCK: Well, reports, plans, you know, low flow mitigation report  
11 or whatever it’s called, but it’s plans, reports, analyses that  
12 are being submitted to Ecology for purposes of trying to get  
to reasonable assurance.

13 MS. COTTINGHAM: But not the routine monitoring or other reports.

14 MR. STOCK: Correct.

15 MS. COTTINGHAM: Okay.

16 MS. MARCHIORO: And that’s confusing, because if what Ms. Osborn is saying  
17 is what’s required by the 401, then if what you’re asking  
18 for is required by the 401, with the exception of monitoring  
reports, then I think it’s a divine<sup>4</sup> set of documents.

19  
20 It appears that what Mr. Stock is saying is anything that  
21 would be used to create additional support for reasonable  
22 assurance, and that does go beyond what’s required by the  
401. *There’ll be expert reports and other documents  
created, and those should not be required to be provided*

23 <sup>2</sup> The debate on this issue covers pages 9-28 of the transcript from the prehearing conference.

24 <sup>3</sup> For example, in response to a statement from Port counsel that he did not want to have to guess which plans ACC  
25 sought early identification and completion of, ACC counsel Ms. Osborn stated “Look in the 401.” See Exhibit B to  
the Declaration of Michael P. Witek in Support of Appellants’ Motion in Limine at 25, line 8. Later in the  
26 discussion, Ecology counsel Mr. Young sought further clarification regarding the specific documents that would be  
subject to the early identification and completion rule. Ms. Osborn responded by saying “there’s quite a list of  
documents that are required to be submitted as part of the 401.” *Id.* at 26, lines 22-24.

<sup>4</sup> The documents may be divine, but Ms. Marchioro probably said “defined.”

1                                    *any time in advance of the final exhibits as far as unless*  
2                                    *we're going to have an expert report identification date.*  
3                                    But I think this is –

4                    MS. COTTINGHAM:            *I would agree with that.* You're looking at the plans and  
5                                    the reports that are required in the 401?

6                    *See Exhibit B to the Declaration of Michael P. Witek in Support of Appellants' Motion in*  
7                    *Limine at 27, lines 11-25 and 28, lines 1-19 (emphasis added).* With this final comment, the  
8                    Board made clear that expert reports and other documents not required by the §401 Certification  
9                    did not have to be provided before the deadline for submitting final exhibit lists. The Board's  
10                   prehearing order also reflected this final resolution of the issue. It distinguished between any  
11                   documents that could be used to demonstrate reasonable assurance, and those plans and reports  
12                   required by the §401 Certification. Only plans and reports in the latter category are subject to the  
13                   November 15 identification and February 1 completion deadlines. None of the 17 documents  
14                   that Appellants seek to exclude fall in this category.<sup>5</sup>

15                   Appellants call special attention to two of the documents on the list, a report on fill  
16                   criteria prepared by Michael Riley of S.S. Papadopoulos and Associates (Riley report) and a  
17                   technical memorandum on wetlands prepared by James Kelley of Parametrix (Kelley  
18                   memorandum). Appellants' statements regarding both documents are extremely misleading.

19                   Appellants suggest they had no notice of the Riley report until it arrived on February 15,  
20                   2002. In fact, one of the Port's attorneys called counsel for ACC on February 7, 2002, and  
21                   2002. In fact, one of the Port's attorneys called counsel for ACC on February 7, 2002, and  
22                   2002. In fact, one of the Port's attorneys called counsel for ACC on February 7, 2002, and  
23                   2002. In fact, one of the Port's attorneys called counsel for ACC on February 7, 2002, and  
24                   2002. In fact, one of the Port's attorneys called counsel for ACC on February 7, 2002, and

25                   <sup>5</sup> The additional "plans" or "reports" required to be submitted under the Amended §401 Certification are (1) the  
26                   Revised Low Flow Plan (submitted December 2001); (2) the Mitigation Plan for Wetland A17 (due on November 9,  
2001); (3) Proposed BMPs to prevent contaminant transport along utility lines (due on November 9, 2001); (4) Post-  
Construction Monitoring Plan (due on November 19, 2001); Revised NRMP (due on December 31, 2001). Finally,  
the Stormwater Facilities O&M Plan is not due until March 19, 2002, and has not yet been submitted.

1 informed him that Dr. Riley was running a computer model to study the protectiveness of the fill  
2 criteria, and that his written report would not be finished until February 15, 2002. *See*  
3 Attachment A at ¶ 3. Since Dr. Riley's deposition was scheduled for February 12, 2002, the Port  
4 offered to allow ACC to reschedule Dr. Riley's deposition after ACC and its experts had had an  
5 opportunity to review the report. *Id.* ACC's counsel initially indicated he would like to  
6 reschedule the deposition, then later sent an email stating that ACC preferred to "go ahead on the  
7 12<sup>th</sup>." *Id.* at ¶ 4.

9 Until they filed their motion in limine, Appellants had never objected to the timeliness of  
10 Dr. Riley's report. Instead, they waited more than a month to raise their objection, and in the  
11 meantime declined the opportunity to reschedule his deposition so they could question him about  
12 the report. As Appellants themselves argued recently in connection with another motion in  
13 limine filed in this matter, such conduct should be viewed as a waiver of their objections.

15 Appellants complain that the Kelley technical memorandum "was not provided to  
16 Appellants by the Port or Ecology, but was extracted from the Corps on March 6, 2002 through a  
17 general federal Freedom of Information Act request." Appellants do not inform the Board that  
18 they themselves suggested the parties *not* exchange exhibits until counsel had an opportunity to  
19 review the final exhibit lists and determine which documents they already had. *See* Attachment  
20 B (letter from Peter J. Eglick to other counsel dated February 18, 2002). Counsel for the Port  
21 concurred with this suggestion. *See* Attachment C (letter from Steven G. Jones to Peter J. Eglick  
22 dated February 19, 2002). Appellants never asked the Port for a copy of the Kelley technical  
23 memorandum, despite the clear understanding that the Port would provide copies of any exhibits  
24 on its list upon request. Appellants' claim of having to "extract" the document from the Corps is  
25 without merit.  
26

1 In a single sentence at the end of their motion, Appellants ask the Board to exclude not  
2 just the 17 exhibits, but also "all portions of prefiled testimony discussing or relying upon" those  
3 exhibits. This is a de novo hearing, in which the parties have the "right and opportunity to  
4 present evidence anew." See *U.S. Department of Energy v. Ecology*, PCHB No. 97-157 (Order  
5 Establishing the Scope and Standard of Review) at 4. This includes work done to respond to  
6 allegations made by other parties in the course of litigation. What Appellants are proposing is  
7 that they and their experts be allowed to collect information and formulate opinions in  
8 preparation for hearing, but that the Port and Ecology be denied that same opportunity. Even if  
9 the 17 exhibits were subject to exclusion (which the Board's prehearing order demonstrates is  
10 not the case), it would be fundamentally unfair to disallow testimony regarding studies done and  
11 data collected to respond to Appellants' contentions in this case.  
12

13  
14 Finally, even if these 17 documents were untimely, Appellants do not explain why the  
15 rules regarding timely disclosure should be strictly enforced against the Port and Ecology but not  
16 against Appellants. The third prehearing order clearly states that all parties were to file *final*  
17 exhibit lists by February 20, 2002. ACC ignored that provision, and added nearly one hundred  
18 documents to its final exhibit list after that deadline.<sup>6</sup> This conduct alone justifies denial of  
19 Appellants' motion to exclude.  
20

## 21 CONCLUSION

22 The requirement to identify certain plans and reports by November 15, 2001 and to  
23 complete those plans and reports by February 1, 2002 applies only to plans and reports prepared  
24 pursuant to the §401 Certification. It has no application to other documents the Port intends to  
25

26 <sup>6</sup> The Board ruled through ALJ Eric Lucas that these exhibits, which ACC undeniably produced late, would be admitted unless another party could show the admission was prejudicial.

1 rely on at the hearing, including expert reports and other documents that Appellants seek to  
2 exclude. Appellants' motion should be denied.

3 DATED this 15<sup>th</sup> day of March 2002.

4 **PORT OF SEATTLE**

5 Tanya Barnett for

6 Linda J. Strout, General Counsel,  
7 WSBA No. 9422

8 Traci M. Goodwin, Senior Port Counsel,  
9 WSBA No. 14974

**FOSTER PEPPER & SHEFELMAN PLLC**

Tanya Barnett for

Roger A. Pearce, WSBA No. 21113  
Steven G. Jones, WSBA No. 19334

10 **BROWN REAVIS & MANNING PLLC**

11 Tanya Barnett for

12 Jay J. Manning, WSBA No. 13579  
13 Gillis E. Reavis, WSBA No. 21451

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION  
and CITIZENS AGAINST SEA-TAC  
EXPANSION,

Appellants,

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

Respondents.

PCHB No. 01-160

DECLARATION OF TANYA BARNETT

1. I am over the age of eighteen and base this declaration on my personal knowledge of the facts stated herein.

2. I am one of the attorneys for the Port of Seattle (Port) in this matter. Airport Communities Coalition (ACC) scheduled the deposition of Dr. Michael Riley, a consultant to the Port, for February 12, 2002.

3. On February 7, 2002, I phoned Mike Witek, one of the attorneys for ACC. I informed Mr. Witek that Dr. Riley was running a computer model to study the transport of chemical constituents through the third runway embankment, and that his work would not be completed by the date of his deposition, February 12. I explained that Dr. Riley expected to complete his work and a written report summarizing that work by February 15. I told Mr. Witek that the

1 Port was willing to reschedule Dr. Riley's deposition for a time after February 15 so ACC and its  
2 consultants would have an opportunity to review Dr. Riley's report before taking his deposition.  
3

4 4. Mr. Witek initially indicated that he would like to reschedule the deposition. Later that  
5 day, however, he sent an email stating that "I may have spoke[n] too soon about moving the dep  
6 to the 18<sup>th</sup> 19 or 20<sup>th</sup>." The following day, Mr. Witek notified me by email that "we will go ahead  
7 on the 12<sup>th</sup>."  
8

9 5. A true and correct copy of these email messages is attached hereto as Exhibit 1.

10 I declare under penalty of perjury under the laws of the State of Washington that the  
11 foregoing is true and correct.  
12

13 DATED this 15<sup>th</sup> day of March 2002 at Olympia, Washington.

14   
15 \_\_\_\_\_  
16 TANYA BARNETT  
17  
18  
19  
20  
21  
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24  
25  
26  
27  
28

**AR 002220**

**From:** Witek, Michael P. <mwitek@helsell.com>  
**To:** Tanya Barnett <tbarnett@martenbrown.com>  
**Date:** Friday, February 8, 2002 9:52 AM  
**Subject:** RE: Riley Dep.

---

Tanya:

Thanks. I think we will go ahead on the 12th. I have a start time of 9:30. Is that what you have?

Mike

-----Original Message-----

**From:** Tanya Barnett [mailto:tbarnett@martenbrown.com]  
**Sent:** Thursday, February 07, 2002 5:12 PM  
**To:** Witek, Michael P.  
**Subject:** Re: Riley Dep.

Dr. Riley is waiting on lab data to finish his work. He has been told that the data will be available around the 12th, and he anticipates finishing his report by the end of next week. We will send you the report just as soon as he completes it (and I think we can do it electronically, so you can quickly forward it to your expert), but that probably will not be until February 15.

--

Tanya Barnett  
tbarnett@martenbrown.com

Marten Brown Inc.  
421 South Capitol Way, Suite 303  
Olympia, Washington 98501

\*\*\*\*\*

This e-mail message may contain confidential and privileged information and is sent for the sole use of the intended recipient. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

**From:** "Witek, Michael P." <mwitek@helsell.com>  
**Date:** Thu, 7 Feb 2002 16:03:21 -0800  
**To:** "Tanya Barnett" <tbarnett@martenbrown.com>  
**Subject:** RE: Riley Dep.

I'll probably need to have our hydro-modeling guy look at it too (unless we just stick with the 12th).  
How soon could I send the report to my expert?  
thanks,

Mike

**EXHIBIT /**

**AR 002221**

-----Original Message-----

**From:** Tanya Barnett [mailto:tbarnett@martenbrown.com]

**Sent:** Thursday, February 07, 2002 2:56 PM

**To:** Witek, Michael P.

**Subject:** Re: Riley Dep.

The work he is doing is a model of the transport of potential contaminants in the embankment fill, not the transport of any contamination from the AOMA. Let me know what you decide about the date. Thanks.

--

Tanya Barnett  
tbarnett@martenbrown.com

Marten Brown Inc.  
421 South Capitol Way, Suite 303  
Olympia, Washington 98501

\*\*\*\*\*

This e-mail message may contain confidential and privileged information and is sent for the sole use of the intended recipient. If you are not the intended recipient, please contact the sender by reply e-mail and destroy all copies of the original message.

**From:** "Witek, Michael P." <mwitek@helsell.com>  
**Date:** Thu, 7 Feb 2002 14:33:46 -0800  
**To:** "Tanya Barnett" <tbarnett@martenbrown.com>  
**Subject:** Riley Dep.

Tanya:

I may have spoke too soon about moving the dep to the 18th 19 or 20th. I'd like to keep the 12th open, and call you back tomorrow (2/8) to confirm the date. I may not be the one taking the deposition. Is the fate and transport model (or study) that Mr. Riley is working on related to transport of stuff in the embankment, or stuff from the Airport Operations and Maintenance Area?

Thanks

Mike

AR 002222

02-18-2002 03:00pm From=HELSELL FETTERMAN LLP

+2063402524

T-850 P.002/006 F-835

Law Offices  
**HELSELL  
FETTERMAN**  
*A Limited Liability Partnership*

Peter J. Eglick  
Attorney at Law

February 18, 2002

By Fax

Mr. Roger Pearce  
Mr. Steven Jones  
Foster Pepper & Shefelman  
1111 Third Ave., Suite 3400  
Seattle, WA 98101

Ms. Joan Marchioro  
Mr. Thomas Young  
Mr. Jeff Kray  
Attorney General's Office, Ecy. Division  
P.O. Box 40117  
Olympia, WA 98504-0117

Mr. Jay Manning  
Mr. Gillis Reavis  
Marten & Brown LLP  
1191 Second Avenue, Suite 2200  
Seattle, WA 98101

Ms. Linda Strout  
Ms. Traci Goodwin  
Port of Seattle  
P.O. Box 1209  
Seattle, WA 98101

Re: *ACC v. Department of Ecology & Port of Seattle*, PCHB No. 01-160:  
Exchange of Hearing Exhibits

Dear Counsel:

The Board's January 22, 2002, Discovery Order (at 6) calls for "final exhibit and witness lists" to be filed by February 20, 2002. It makes no mention of exchanging exhibits. The Board's October 30, 2001 Prehearing Order, however, stated: "The parties shall exchange exhibits by February 8, 2002."

Given that many of the exhibits will undoubtedly be documents which are already available to all parties (e.g., parts of the record on the motion for stay, and/or deposition exhibits, and/or well-known background documents), and because the Board's Order gives us until March 8 to eliminate duplication among our exhibit lists, it does not appear necessary to exchange exhibits on February 20th. Instead, each party should assess the other parties' lists submitted on the 20th, and then request copies of exhibits they do not already have, which all would agree to provide in a timely manner.

The parties should also be able to pare down their exhibit lists substantially between February 20 and March 8, as the discovery process ends and a better picture of what needs to be presented at the hearing emerges.

AR 002223

02-18-2002 03:00pm From-HELSELL FETTERMAN LLP

+2063402524

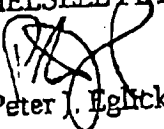
T-850 P.003/006 F-635

February 18, 2002  
Page 2

Please let us know at your earliest convenience whether you have a different interpretation of what is required so that we can seek guidance from the Board if necessary.

Sincerely,

HELSELL FETTERMAN LLP

  
Peter J. Eglitz

cc: Rachael Paschal Osborn  
Rick Poulin  
Wendy Clement

g:\in\acc\pchbl\counsel-021302-exh.doc

AR 002224

FOSTER PEPPER & SHEFELMAN PLLC  
ATTORNEYS AT LAWDirect Phone  
(206) 447-8902Direct Facsimile  
(206) 749-1962E-Mail  
JonesS@foster.com

February 19, 2002

VIA FACSIMILEMr. Peter J. Eglick  
Helsell Fetterman, LLP  
1325 Fourth Avenue  
Suite 1500  
Seattle, WA 98101Re: ACC v. Department of Ecology and Port of Seattle,  
PCHB No. 01- 150  
Exchange of Exhibits

Dear Peter:

I am writing in response to your letter of February 18, 2002 regarding exchange of exhibits. The Port of Seattle concurs in your interpretation of the Board's Discovery Order with respect to the identification and exchange of exhibits. While the Port will be identifying its witnesses and exhibits on February 20, we agree that it makes sense to defer any exchange of exhibits until after the close of discovery. We will be reviewing ACC and Ecology's witness and exhibit lists and identifying documents that we do not already have in our files and then work with counsel on exchanging documents.

Sincerely,

FOSTER PEPPER &amp; SHEFELMAN PLLC

Steven G. Jones

cc: Linda Strout/Traci Goodwin  
Joan Marchioro/Tom Young/Jeff Krey  
Jay Manning/Gillis Reavis1721 THIRD  
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AlaskaPORTLAND  
OregonSEATTLE  
WashingtonSPOKANE  
Washington

AR 002225

Attachment C

ORIGINAL

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HEARINGS OFFICE

POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION  
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STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY, and THE  
PORT OF SEATTLE,

Respondents.

PCHB No. 01-160

CERTIFICATE OF SERVICE

I am employed with the law firm of Brown Reavis & Manning, whose address is 421 Capitol Way S., Suite 303, Olympia, Washington 98501; I am not a party to the cause; and I am over the age of eighteen years. I further declare that on the date hereof I served a copy of **Port's Response to Appellant's Motion in Limine to Exclude "Late-Produced" Plans and Reports; Declaration of Tanya Barnett; Port of Seattle's Response to Appellants' Motion to Strike Port's Brief; and Certificate of Service**

by personally hand delivering same on this day to:

Pollution Control Hearings Board  
4224 6<sup>th</sup> Avenue SE  
Row 6, Bldg. 2, MS 40903  
Lacey, WA 98504

and to: Washington State Attorney General's Office  
Ecology Division  
2425 Bristol Court SW, 2nd Floor  
Olympia, WA 98504-0117

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct. Executed at Olympia, Washington, this 15<sup>th</sup> day of March 2002.

  
Julie Bunting

AR 002226

CERTIFICATE OF SERVICE

BROWN REAVIS & MANNING PLLC  
421 S. CAPITOL WAY, SUITE 303  
OLYMPIA, WASHINGTON 98501  
(360) 786-5057