

POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
) PCHB 01-160
 Appellant,)
) EVIDENTIARY ORDER
 CITIZENS AGAINST SEATAC)
 EXPANSION,)
)
 Intervenor,)
)
 v.)
)
 STATE OF WASHINGTON,)
 DEPARTMENT OF ECOLOGY and THE)
 PORT OF SEATTLE,)
)
 Respondents.)

On March 12, 2002, at 1:30 p.m., an evidentiary hearing was held for the purpose of addressing the admissibility of exhibits to be introduced in the upcoming hearing on the above noted appeal. Eric Z. Lucas, Administrative Appeals Judge, presided for the Board. The parties were represented by Kevin Stock and Michael Witek (for ACC), Rick Poulin (for CASE), Steve Jones (for the Port) and Jeff Kray (for Ecology). Cindy L. Ide provided court-reporting services.

The following reflects the decisions made after hearing from all parties:

1. Lead Attorney

The Board requested that a lead attorney be assigned by each party for the examination of a particular witness. All parties agreed to this procedure and indicated that it is their standard practice.

1 2. Order of Witnesses

2 The Board requested that appellants indicate, in advance of the March 14, 2002
3 submission, their witness order for the first two days of the hearing. Appellants agreed to email
4 this information to the Board the morning of March 13, 2002.

5 3. Exchange of Exhibits

6 The presiding officer inquired whether all exhibits had been exchanged that were
7 objected to for failure to be included on the February 20, 2002 exhibit list. Generally, the
8 response was affirmative that the exhibits subject to that specific objection had been exchanged.
9 However, a complaint was lodged concerning other documents that were not disclosed by the
10 deadline.

11 4. Motion in Limine

12 The presiding officer inquired whether the parties contemplated filing any more motions
13 in limine. ACC indicated that they had one more motion in limine slated for David Garland. All
14 other parties indicated that no other motions in limine were contemplated.

15 5. Preliminary Stipulations

16 After a fifteen-minute recess the parties returned and presented the Board with
17 preliminary stipulations on certain matters in dispute. The Port and Ecology agreed to waive all
18 timeliness objections for documents not on the February 20, 2002, list that were subject to a
19 information request by appellants where third-party response was the reason for failing to meet
20 the deadline. The parties agreed that objections to laying the proper foundation for admission of
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1 those documents would be held until said document was introduced through a testifying witness.

2 The parties also agreed to reserve all relevancy objections until the time of the hearing.

3 6. Global or Categorical Objections: Argument and Ruling

4 The parties could not come to agreement on two kinds of objections described as “global
5 or categorical” exhibit objections. They could not agree on how to handle global hearsay
6 objections or how to handle global objections for failure to include an exhibit on the February
7 20, 2002 exhibit list (henceforth the “2/20 objection”). The presiding officer heard argument on
8 these issues, briefly summarized below.

9 a. Hearsay Objections

10 The Port argued that the objection had to be considered in light of the pre-filed testimony.
11 Since said testimony was limited to 30 pages, failure to introduce a hearsay objection to exhibits
12 listed by appellants would allow appellants to expand their pre-filed testimony beyond the 30-
13 page limit. The Port indicated that pre-filed testimony was prepared in reliance on disclosure of
14 exhibits and that the initial disclosure by the appellants revealed only “102 designated” exhibits
15 which later expanded to 500. The Port indicated that they were prejudiced by this omission and
16 that no remedy other than exclusion of the exhibit would cure the harm.

17 Ecology argued that its hearsay objection was based on the fact that there would be no
18 sponsoring/offering witness for entry of the exhibit. Ecology supplemented this comment by
19 arguing that identifying a block of exhibits that would be entered without an offering witness
20 would fail to “focus the case” for the Board by creating an overbroad record. Ecology indicated
21 that case focus should be an obligation of the parties.

1 In response ACC cited the broader hearsay standard of admissibility under WAC 371-08-
2 500. It argued that this is not the “classic” hearsay rule. ACC also argued that the Board is
3 accustomed to hearing and weighing hearsay. ACC noted that the Port and Ecology’s arguments
4 failed to address the likelihood that many exhibits would meet either the “Business Records” or
5 the “Learned Treatise” exceptions to the hearsay rule.

6 CASE argued that there is no per se inadmissibility of hearsay. CASE asserted that
7 depositions were admissible under WAC 371-08-520. CASE also argued that the Port
8 overstated the strictness of the 30-page limit on pre-filed testimony. They argued that it was
9 more of a “convenience” rather than an absolute bar.

10 b. 2/20 Exhibit List Objections

11 The Port reiterated its argument about pre-filed testimony and the prejudice engendered
12 by allowing post-deadline expansion of the list.

13 Ecology argued that two categories of exhibits were subject to their 2/20 objection: 1)
14 ACC Exhibit 207 deposition materials, and, 2) Exhibits that appeared for the first time in pre-
15 filed testimony. Ecology’s position was that these categories should be treated as not disclosed.

16 ACC responded by asserting that every party who attended the depositions had the “207”
17 exhibits available to them plus a court reporter prepared “Master list” of exhibits. ACC also
18 argued that both the Port and Ecology, in their own exhibit list, used the same generic technique
19 utilized by ACC of incorporation by reference. ACC argued that its actions met the Board’s 3-
20 part ruling on admissibility because each of its exhibits was: 1) on the 2/20 exhibit list, 2)
21 exchanged by the parties and 3) qualified under the civil rules. To the “case focus” argument

1 ACC responded that a huge effort had been made to focus this case since, compared to civil
2 litigation, two years worth of discovery was condensed into two months.

3 CASE indicated that it also used the device of incorporating exhibits by reference
4 depending on and referencing ACC's disclosure.

5 c. Rulings On Objections

6 1. Hearsay

7 With regard to hearsay, the presiding officer ruled that all exhibits objected to for reasons of
8 hearsay will not be admitted for the truth of the matter asserted. Instead they will be admitted for the
9 limited uses of showing background, purpose or context. If a party wishes to have a specific exhibit,
10 which has been admitted in this limited manner, admitted for the truth it asserts, then when introduced
11 at the Board Hearing, the party must link that exhibit to WAC 371-08-500 or show how it meets an
12 exception to the hearsay rule. The exhibit's proponent will also be required to lay the proper
13 foundation to meet the designated hearsay exception.

14 2. 2/20 Exhibit List Objections and Untimeliness

15 With regard to 2/20 Exhibit List Objections, the presiding officer noted that the purpose
16 of such deadlines is to streamline process and prevent surprise. Thus, in the instant case, the
17 penalty for untimeliness would not be denial of admissibility. Normally, the remedy for
18 violations of this sort would be to grant the injured party a continuance or provide some other
19 type of grant of additional time to respond. Accordingly, unless a party can show that they have
20 been prejudiced by the untimeliness of an exhibit it will be admitted. The showing of harm will
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1 be reserved to the Board Hearing and shall be made when the exhibit is introduced. Failure to do
2 so will result in the admission of that exhibit without limitation.

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4 7. Admission of Exhibits

5 With the aforementioned general rulings in place, the presiding officer proceeded to rule
6 on the admissibility of each exhibit. Each exhibit received one of five (5) rulings:

- 7 1. Admitted by stipulation of the parties
- 8 2. Admitted for a limited purpose (hearsay)
- 9 3. Admitted with reservation (the showing of prejudice is reserved)
- 10 4. Withdrawn
- 11 5. Rejected

12 The most frequent exhibit objection was for hearsay. Accordingly, the majority of
13 admitted exhibits are admitted with the limitation as to use. Many exhibits had multiple
14 objections asserted against them. When one of them was a hearsay objection, admission was
15 based on that objection. Admission with reservation means that the only objection made was for
16 untimeliness or the 2/20 Exhibit List violation.

17 ACC made multiple objections on exhibits including a blanket objection for hearsay to
18 each Port and Ecology exhibit. Given this fact, ACC reserved its relevance objections to the
19 Board Hearing.

20 The presiding officer and the parties worked from a matrix of exhibits, prepared by the
21 parties, that was distributed on March 11, 2002. An updated copy of this matrix, which

1 incorporates the rulings made at the hearing, will be prepared by the parties and delivered to the
2 Board on Thursday, March 14, 2002.

3 Exhibits were numbered per prior Board order from 1 to 2240. Since the parties were
4 given numbers to use in blocks, all the numbers in sequence are not utilized. The parties used
5 some numbers to refer to another party's earlier numbered exhibit. (See for example Exhibit No.
6 2136.) The parties agreed that when multiple numbers described the same exhibit that one
7 number would be used as reference for exhibit labeling and at the hearing.

8 Therefore, the exhibits referred to have been ruled on and admitted as described on the
9 updated matrix which is incorporated into this order by reference and a copy of which shall be
10 attached to the original of this order.

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ORDER

This order supplements all prior pre-hearing orders. All pre-hearing orders shall govern the proceedings, unless subsequently modified by order of the Board for good cause upon a party's motion or the Board's volition.

SO ORDERED this 15th day of March, 2002.

POLLUTION CONTROL HEARINGS BOARD



Eric Z. Lucas
Administrative Appeals Judge
Presiding for Evidentiary Hearing Only