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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,	)	
	)	PCHB No. 01-160
Appellant,	)	
	)	APPELLANTS' MOTION IN LIMINE TO
v.	)	EXCLUDE TESTIMONY FROM
	)	ECOLOGY'S DAVE GARLAND
STATE OF WASHINGTON,	)	
DEPARTMENT OF ECOLOGY; and	)	
THE PORT OF SEATTLE,	)	
	)	
Respondents.	)	

I. INTRODUCTION

On March 7, 2002, Ecology produced its pre-filed direct testimony, including testimony from Ecology's Dave Garland. In his pre-filed testimony, Mr. Garland states that, "Most recently, I reviewed PGG's<sup>1</sup> updated modeling of the embankment for the December 2001 Low Stream Flow Analysis and Summer Low Flow Impact Offset Facility Proposal submitted by the Port of Seattle. The results of my reviews have been documented in memos to Ann Kenny and others dated March 9, 2001, May 5, 2001, August 7, 2001, and March 6, 2002." Garland Pre-filed Testimony at ¶ 4 (emphasis added). Mr. Garland's Testimony then goes on to discuss and

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<sup>1</sup> Pacific Ground Water Group ("PGG") is the consultant used by the Port of Seattle to prepare an embankment model for the Port's December 2001 Low Stream Flow Analysis and Summer Low Flow Impact Offset Facility Proposal.

**ORIGINAL**

APPELLANTS' MOTION IN LIMINE TO  
EXCLUDE TESTIMONY FROM DAVE GARLAND - 1

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1 express his opinions regarding the Port's new December 2001 Low Flow Analysis, and to reply  
2 to criticisms of the plan by ACC's Dr. Lucia. *Id.* at ¶¶ 11-15; 16-19.

3 This was the first indication ACC had that Mr. Garland reviewed, prepared a report on,  
4 and would be testifying concerning the December 2001 Low Flow Analysis, despite repeated,  
5 specific inquiries to Ecology as to whether Mr. Garland would give such testimony. Ecology's  
6 inexcusable failure to identify or produce Mr. Garland's March 6 Low Flow report to Ms.  
7 Kenny, and its inexcusable failure to identify the subject matter of Mr. Garland's testimony,  
8 require the exclusion of any testimony, prefiled or at hearing, from Mr. Garland.

## 10 II. FACTS

11 On November 28, 2001, ACC sent Interrogatories and Requests for Production to  
12 Ecology, asking Ecology to state with particularity, for each of its experts:

- 13
- 14 a. the subject matter on which the expert is expected to testify;
  - 15 b. the substance of the facts and opinions to which the expert is expected to testify;  
16 and
  - 17 c. a summary of the grounds for each opinion.

18 In response, Ecology stated:

19 Mr. Garland will testify regarding his management of two studies regarding Maury Island  
20 and the SeaTac Third Runway fill, his review of hydrologic impacts on wetlands from  
21 excavation of the borrow areas, and his review of the integration of the groundwater  
22 modeling performed by the Port for the embankment fill as it relates to the Port's low  
23 flow Mitigation Plan. His testimony will be based on his review, education and  
24 experience.<sup>2</sup>

25 ACC also asked Ecology to produce all documents relied on or reviewed to form the basis of the  
26 opinions, facts or other testimony of its experts. For Dave Garland, Ecology stated: "Ecology

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<sup>2</sup> Ecology response to Interrogatory No. 3, attached as Exhibit A to the Declaration of Rachael Paschal Osborn in Support of Appellants' Motion in Limine to Exclude Testimony From Dave Garland ("Osborn Decl.").

1 will supplement this response when information is received. Osborn Decl., Ex.A. When  
2 Ecology did supplement its response to ACC's request for production, it identified eight  
3 documents "reviewed, produced or relied upon" by Mr. Garland, which did not include the  
4 December 2001 Low Flow Analysis. Osborn Decl., Ex. B. Ecology provided this supplemental  
5 response on January 9, 2002, the day Mr. Garland was deposed.  
6

7 In his deposition Mr. Garland was specifically asked whether he would be reviewing the  
8 Port's new December 2001 Low Flow Analysis, and counsel for Ecology gave assurances that  
9 Mr. Garland would be made available if he did review the plan:

10 Q. Have you reviewed the December 2001 version of the Port's low flow plan?

11 A. No.

12 Q. Are you familiar with that document?

13 A. I think it was on my chair this morning, and I listened to a voice mail just this  
14 morning from Ann Kenny asking me to review it, I think.

15 \* \* \*

16 Q. Assuming that the document that's on your chair is the December 2001 version of the  
17 low flow plan, what are your plans with respect to review of that timingwise?

18 A. I don't have any plans at this time.

19 Q. Will you review it?

20 A. I think I probably will. I'll talk to Ann Kenny about that.

21 Q. But you don't know when?

22 A. No. My first concern this morning was to negotiate traffic and get down here for this  
23 deposition.

24 Ms. Osborn: Okay. So, Tom [Young, Ecology counsel], we may need to schedule - -

25 Mr. Young: If we do, we will. Fine.

Ms. Osborn: Just make a note of that. I may need to do a continuation of the deposition.

Garland Deposition pp. 25-26 (Osborn Decl., Ex C).

26 To follow up, in case Ecology had forgotten its commitment, ACC counsel sent a letter to  
27 Ecology counsel on January 24, 2002, reminding that Ecology's supplemental interrogatory  
28 response (a memo from Mr. Garland to Ecology counsel) "does not indicate that he will testify  
29 regarding the low flow plan." Osborn Decl., Ex. D. Pointedly, ACC counsel stated:

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APPELLANTS' MOTION IN LIMINE TO  
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1 If in fact Mr. Garland will testify regarding the content of the plan, please supplement  
2 your responses to interrogatories so that we may schedule a follow-up deposition on the  
subject of the Low Flow Plan, as contemplated in the Board's Pre-Hearing Order. Id.

3 Receiving no response to the January 24 letter, ACC counsel followed up again in a  
4 February 15, 2002 email:

5  
6 As we discussed at the Rozeboom deposition, I am awaiting an answer to my January 24  
letter inquiring whether Dave Garland will testify on the Port's low flow mitigation plan.  
7 If he is planning to testify, I would like to continue his deposition on that topic. Please  
advise. Time is short and I believe all of our calendars are very full.

8  
9 Osborn Decl., Ex. E.

10 On February 20, 2002, Ecology's Ann Kenny was deposed and asked, "other than what  
11 Mr. Whiting has done to review that December 2001 Low Flow Plan, has the department of  
12 Ecology conducted any review independent of what Mr. Whiting has done?" Ms. Kenny  
13 appeared first to be about to disclose that Mr. Garland was reviewing the December 2001 low  
14 flow plan -- but then abruptly caught herself: "I have Mr. Garland, Dave Garland, reviewing the  
15 low flow portion -- I'm sorry, the modeling for the embankment." Ann Kenny, February 20,  
16 2002, deposition transcript at p.226 (Osborn Decl., Ex F).

17  
18 In light of this, and not having heard from Ecology counsel, ACC counsel made yet  
19 another attempt in a March 4 letter to have Ecology commit on whether Mr. Garland would  
20 testify concerning the December 2001 low flow plan so that ACC could prepare:

21 This letter confirms our conversation last Thursday, February 28 [during Kelly Whiting's  
22 deposition]. Dave Garland was unaware at his deposition on January 9 whether he would  
be testifying regarding the Low Flow plan and Ecology's responses to interrogatories do  
23 not indicate that he would do so. Despite my several requests via letter, e-mail and in  
person, you have not been able to confirm Mr. Garland's activities in this respect.  
24 Nonetheless, as indicated by Kelly Whiting [on February 28],<sup>3</sup> Mr. Garland has in fact

25  
<sup>3</sup> See Osborn Decl., Ex. G (excerpts from Whiting deposition).

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APPELLANTS' MOTION IN LIMINE TO  
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1 been reviewing the Port's December 2001 Low Flow Mitigation Plan on behalf of  
2 Ecology.

3 Per our discussion last week, ACC wishes to depose Mr. Garland, in advance of hearing,  
4 regarding his review of the Low Flow Plan. I would appreciate hearing from you at the  
earliest possible time to learn when this may be accomplished.

5 Osborn Decl., Ex.H. Ecology never responded to ACC's letters and emails of January 24,  
6 February 15, and March 4, 2002<sup>4</sup> -- unless the filing on March 7, 2002, of Mr. Garland's prefiled  
7 testimony addressing the low flow plan is considered a "response."  
8

### 9 III. ISSUE PRESENTED

10 Whether Ecology may offer testimony from Dave Garland after Ecology failed to  
11 disclose, despite repeated inquiries, the subject matter to which Mr. Garland would testify and  
12 where that testimony is based on a report prepared on March 6, 2002, which was never  
13 disclosed?

### 14 IV. AUTHORITIES RELIED UPON

15 ACC and CASE rely upon WAC 371-08-450, WAC 371-08-435, the Board's Pre-  
16 Hearing Order dated October 30<sup>th</sup>, 2001<sup>5</sup>, and the authorities cited herein.  
17

### 18 V. ARGUMENT

19 The Board should exclude the pre-filed testimony of Mr. Garland, and enter an order  
20 preventing respondents from offering testimony at hearing from him for either of two  
21 independent reasons. First, Mr. Garland's testimony relies upon a report prepared after the plans  
22 and reports cutoff date of February 1, 2002. Second, Appellants are clearly prejudiced by  
23

---

24 <sup>4</sup> See Osborn Decl. at ¶¶ 9-10.

25 <sup>5</sup> Upon motion by ACC, the Board issued an Order on January 22, 2002, modifying some of the Pre-hearing Order  
deadlines, but did not change the February 1, 2002 cutoff for plans and reports the Port and Ecology could rely upon  
at the hearing. See January 22, 2002, Order at p. 6.

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APPELLANTS' MOTION IN LIMINE TO  
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1 Ecology's willful failure to timely disclose the subject matter of Mr. Garland's testimony, in the  
2 face of ACC counsel's repeated, diligent invitations to Ecology to cooperate in this regard.

3           Once entered, a prehearing order controls the subsequent course of the appeal "unless  
4 modified for good cause by subsequent order of the board or the presiding officer." WAC 371-  
5 08-435. The Prehearing Order required respondents to identify plans and reports by November  
6 15, 2001, and produce them by February 1, 2002.<sup>6</sup>

7  
8           Here, in his pre-filed testimony, Mr. Garland admits that he has prepared a report to  
9 Ecology's Ann Kenny on the December 2001 low flow plan, dated March 6, 2002. Ecology is  
10 attempting to avoid the Board's Pre-hearing Order by not offering Mr. Garland's report, but  
11 offering testimony which relies upon that report. The Pre-hearing Order not only precludes  
12 respondents from offering Mr. Garland's untimely report, it precludes respondents from "relying  
13 at the hearing" upon it. Accordingly, the Board should exclude Mr. Garland's testimony.

14  
15           The prejudice to ACC from Ecology's failure to timely disclose the subject matter of Mr.  
16 Garland's testimony cannot be disputed. Mr. Garland's pre-filed testimony was served on  
17 Appellants on March 7, 2002, little more than one week before trial and is based upon a report  
18 that has yet to be produced. Although Ecology was asked at least seven times, in interrogatories,  
19

20 <sup>6</sup> The Prehearing Order states that respondents must:

21       identify all plans and reports (other than ministerial documents) prepared or expected to be prepared  
22       pursuant to the §401 Certification and which either Ecology or the Port intends to rely upon at the hearing.  
23       For those plans and reports that are complete as of November 15, 2001, Respondents shall provide copies  
24       to Appellant ACC on or before November 15, 2001. For those plans or reports expected to be completed  
25       between November 16, 2001 and February 1, 2002, Respondents shall identify the estimated completion  
      dates. If those plans and reports are completed on or before February 1, 2002, Respondents shall 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.

October 30, 2001 Pre-hearing Order, p. 4 (emphasis added).

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APPELLANTS' MOTION IN LIMINE TO  
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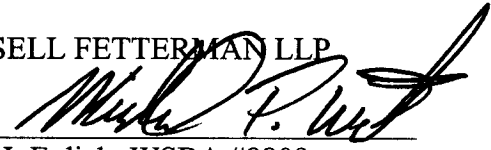
1 in deposition, and by letters, emails or in person, if Mr. Garland would be testifying about the  
2 December 2001 Low Flow Plan, Ecology failed to disclose that this would be a subject in his  
3 testimony. Ecology has no reasonable excuse for this discovery violation. The absence of a  
4 reasonable excuse for noncompliance with a discovery order is sufficient to support a finding  
5 that the noncompliance was willful and a proper basis for excluding testimony.<sup>7</sup>  
6

## 7 VI. CONCLUSION

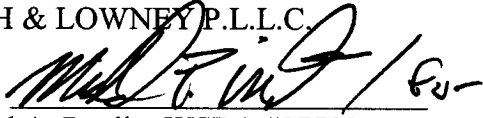
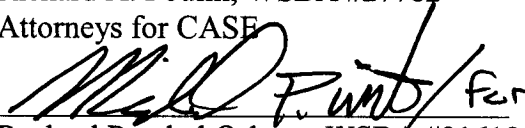
8 Mr. Garland's testimony relies upon a report not identified on November 15 and not  
9 produced by February 1, 2002. In fact, Mr. Garland's report (on a December document) was not  
10 prepared until March 6, 2002, and despite repeated inquiries, Ecology failed to disclose the  
11 subject matter of Mr. Garland's testimony and failed to make him available for deposition, even  
12 after Ecology counsel stated, on the record, that Ecology would make Mr. Garland available if he  
13 were to review the December 2001 low flow plan. The only appropriate remedy for this  
14 discovery violation is exclusion of testimony from Mr. Garland.  
15

16 DATED this 14<sup>th</sup> day of March, 2002.

17 HELSELL FETTERMAN LLP

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24 <sup>7</sup> *Falk v. Keene Corp.*, 53 Wn. App. 238, 250-251, 767 P.2d 576 (Div 1. 1989), *aff'd on other grounds*, 113 Wn.2d  
25 645, 782 P.2d 974 (1989) (trial court has broad discretion to regulate discovery, especially in complex cases).

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APPELLANTS' MOTION IN LIMINE TO  
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