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POLLUTION CONTROL HEARINGS BOARD  
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, )  
 ) PCHB No. 01-160  
 Appellant, )  
 v. ) APPELLANTS' MOTION IN LIMINE TO  
 ) EXCLUDE LATE-PRODUCED PLANS  
 STATE OF WASHINGTON, ) AND REPORTS  
 DEPARTMENT OF ECOLOGY; and )  
 THE PORT OF SEATTLE, )  
 )  
 Respondents. )  
 )  
 )

I. INTRODUCTION

One thing has become clear through the course of this litigation: respondents control access to the site and to data and reports concerning the project. ACC was forced to ask the Board to compel a site visit. It has struggled to obtain data and reports concerning the project as the Port and Ecology have continued to concoct "bases" for reasonable assurance that had not existed when Ecology certified the project in August and again in September.

Respondents' prefiled testimony was served on ACC counsel just a few days ago, on March 7, 2002.<sup>1</sup> While there has not been time to review it in detail (prehearing briefs and final exhibit lists were due shortly after the respondents' prefiled testimony), even an initial review

<sup>1</sup> The Port and Ecology have had Appellants prefiled testimony since February 22, 2002.

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1 demonstrates that the respondents have not complied with requirements in the Prehearing Order  
2 intended to check respondents' tendency to keep the 401 in play as a moving target.<sup>2</sup> For  
3 example, in a hand-off maneuver, Ecology now offers as an exhibit an embankment fill modeling  
4 report prepared by Port consultant Michael Riley after the first of the year and not disclosed at all  
5 until after 6:00 p.m. on February 15, 2002 (Ecology Exhibit 1320<sup>3</sup>). Similarly, Ecology offers as  
6 its Exhibit 2055 a Port "Technical Memorandum" regarding wetlands, dated January 21, 2002,  
7 submitted by the Port to the Army Corps of Engineers on January 25, 2002, but they never  
8 disclosed to ACC.<sup>4</sup> Accordingly, the Board should, consistent with the October 30, 2001  
9 Prehearing Order, exclude these and all other untimely Respondent plans and reports from the  
10 hearing.  
11

## 12 II. FACTS

13 The Board's October 30 Prehearing Order states:

14 On or before November 15, 2001, respondents Ecology and the Port shall identify all  
15 plans and reports (other than ministerial documents) prepared or expected to be prepared  
16 pursuant to the §401 Certification and which either Ecology or the Port intends to rely  
17 upon at the hearing. For those plans and reports that are complete as of November 15,  
18 2001, Respondents shall provide copies to Appellant ACC on or before **November 15,**  
19 **2001**. For those plans or reports expected to be completed between November 16, 2001  
20 and February 1, 2002, Respondents shall identify the estimated completion dates. If  
21 those plans and reports are completed on or before February 1, 2002, Respondents shall  
22 provide copies to Appellant ACC when complete. Ecology and the Port are prohibited  
23 from relying at the hearing upon any plan or report prepared after November 15, 2001  
24 unless such plan or report is noted on the above-required list. Even if noted on the list,  
25 Ecology and the Port are prohibited from relying at the hearing upon any plan or report  
prepared after February 1, 2002. (Emphasis added.)

<sup>2</sup> A preliminary list of untimely plans and reports is attached to the Declaration of Michael P. Witek in Support of Appellants' Motion in Limine ("Witek Decl."), as Exhibit A.

<sup>3</sup> This report is discussed extensively in Michael Riley's prefiled testimony, but not made an exhibit thereto.

<sup>4</sup> ACC was only able to obtain the report under the federal FOIA on March 7, 2002.

1 This order resulted from a lengthy prehearing conference on October 15, 2001, during  
2 which ACC requested that the Board establish cutoff dates by which Ecology and the Port would  
3 identify and then produce any plans or reports they intended to rely upon to establish reasonable  
4 assurance at trial. October 15, 2001, Prehearing Transcript at p. 9.

5 The Port's Mr. Pearce stated:

6 We'd suggest another prehearing conference, and we'd like to hear from ACC what plans  
7 they're concerned about. We don't want to have to guess."<sup>5</sup>

8 ACC counsel Mr. Stock responded:

9 I think the guiding principle should be any plan, report, document, analysis other than  
10 those that are kept in the normal course of business such as a monitoring reports that the  
11 Port or Ecology plan to rely upon at the March 18 hearing to try to convince this Board  
12 that there was reasonable assurance on September 21, and of course this is without  
prejudice to ACC's argument that de novo review is as of September 21.<sup>6</sup>

13 The following exchange then occurred:

14 Ms. Cottingham: Here's what I have written down. And for a definition of plans, I think  
15 I heard you broadened this last go-around, but I wrote down --

16 Mr. Stock: That wasn't my intent.

17 Ms. Cottingham: Well, you said reports.

18 Mr. Stock: Well, reports, plans, you know, low flow mitigation report or whatever it's  
19 called, but it's plans, reports, analyses that are being submitted to Ecology for the  
purposes of trying to get to reasonable assurance.

20 Ms. Cottingham: But not routine monitoring or other reports.

21 Mr. Stock: Correct.<sup>7</sup>

22 Ultimately, after further back and forth between counsel and with the Presiding Officer,  
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24 <sup>5</sup> Transcript at p. 25.

<sup>6</sup> Id. (emphasis added).

25 <sup>7</sup> Transcript at p. 27.

1 she summarized the outcome of the discussion:

2 We haven't even gotten to all that [discovery cutoff date]; it can be linked up later. So  
3 any plans that Ecology or the Port identify before November 15th, that they intend to  
4 release or rely upon prior to February 1st, that that's then the ultimate cutoff point, and  
5 that they need to identify those on or before November 15th, and then allow you time to  
depose experts or whoever between then, and I will set the end for that discovery period  
of February 28th just on those newly identified.<sup>8</sup>

6 As a result, in the Prehearing Order, the Board set deadlines for both identification and  
7 production of plans and reports upon which the respondents could rely.

8 **III. ISSUE PRESENTED**

9 Whether the Port and Ecology may rely through testimony or exhibits upon plans and  
10 reports, however labeled, either not identified in the required November 15 list and/or not  
11 produced after the February 1, 2002, cutoff date established in the Board's Prehearing Order?  
12

13 **IV. AUTHORITIES RELIED UPON**

14 ACC and CASE rely upon WAC 371-08-450, WAC 371-08-435, the Board's Prehearing  
15 Order dated October 30<sup>th</sup>, 2001,<sup>9</sup> and the authorities cited herein.

16 **V. ARGUMENT**

17 Once entered, a prehearing order controls the subsequent course of the appeal "unless  
18 modified for good cause by subsequent order of the board or the presiding officer." WAC 371-  
19 08-435. After extensive discussion, the Board issued a prehearing order requiring the  
20 respondents to identify plans and reports by November 15 and prohibiting the Port and Ecology  
21 from "relying at the hearing upon any plan or report prepared after February 1, 2002."  
22

23 <sup>8</sup> Id.

24 <sup>9</sup> Upon motion by ACC, the Board issued an Order on January 22, 2002, modifying some of the Prehearing Order  
25 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.

1 Prehearing Order at 4. The Board intentionally set the plans and reports identification deadline  
2 (November 15) and cutoff date (February 1) in this “monumental” hearing, with a “tight  
3 prehearing and discovery schedule”<sup>10</sup> to prevent the 401 from becoming any more of a moving  
4 target than it already was. The deadline and cutoffs were to give the appellants a fair opportunity  
5 to have post 401 plans or reports analyzed by their experts, and to depose the Port and Ecology  
6 consultants responsible for the new plans and reports. This was not too much to ask for a 401  
7 first issued in early August.  
8

9 It is now clear that the Port and Ecology do not intend to abide by the Board’s Prehearing  
10 order. On February 15, 2002, at 6:02 p.m. (two weeks after the February 1, 2002 cutoff for  
11 production of plans and reports, three months after the date for identification of plans and  
12 reports, and six months after issuance of the August 401), the Port of Seattle produced via email  
13 from Port counsel to ACC counsel a report entitled “Seattle-Tacoma International Airport Third  
14 Runway Embankment Fill Water-Quality and Transport Analysis” (the “Embankment Report”)  
15 from Port consultant Michael Riley, with S.S. Papadopoulos and Associates. Witek Decl., Ex. C.  
16 In his deposition a few days earlier, on February 12, 2002, Mr. Riley testified that he had not  
17 even been asked to do any work with respect to the embankment fill until after the first of the  
18 year:  
19

20 Q. Do you remember when it was that you were asked to do this work?

21 A. I think it was right after the first of the year.

22 Q. Were you asked to prepare a report summarizing your work?

23 A. Which?

24 Q. In evaluating the protectiveness of the fill criteria, and you can break that  
25 down into subtopics as you deem appropriate.

A. We’ve been asked to prepare a report on that work.

<sup>10</sup> Denial of Certificates of Appealability, p. 4.

1 Q. Were you given a deadline for finalizing this report?

2 A. Well, the first deadline or the one that's now currently in place? The current  
3 one is by the end of this week.

4 Q. What about the first deadline?

5 A. Oh, that was probably about two weeks ago.<sup>11</sup>

6 Curiously, Mr. Riley's Embankment Report for the Port is listed as proposed Exhibit  
7 No. 1320 on the Ecology Exhibit list, and discussed in his prefiled testimony on behalf of the  
8 Port at pages 1-9. Similarly, Ecology offers, as proposed exhibit No. 2055, a report on wetlands  
9 prepared by Port consultant James Kelley of Parametrix, dated January 21, 2002, which was  
10 apparently submitted to the Army Corps of Engineers ("Corps") on January 25, 2002. Witek  
11 Decl., Ex. E. This report, titled "Technical Memorandum-Supplemental Information Regarding  
12 Wetlands" was not provided to Appellants by the Port or Ecology, but was extracted from the  
13 Corps on March 6, 2002 through a general federal Freedom of Information Act request. Witek  
14 Decl. at ¶7.

15 Neither of these reports were identified by respondents on November 15, and neither  
16 were provided to Appellants by February 1, 2002.<sup>12</sup> Exclusion of such plans and reports is  
17 therefore required under the explicit terms of the Prehearing Order.<sup>13</sup> Further, the Board should  
18 exclude all portions of prefiled testimony discussing or relying upon them.

19  
20  
21 <sup>11</sup> Riley Deposition, February 12, 2002, Transcript at p. 19 (Witek Decl., Exhibit D).

<sup>12</sup> See, Witek Declaration, Exhibit F.

22 <sup>13</sup> In fact, Washington cases support the exclusion of all testimony from an expert from whom there has not been  
23 required disclosure. See, *Scott v. Grader*, 105 Wn. App. 136, 141-142, 18 P.3d 1150 (Div. 1 2001) (affirming trial  
24 court's exclusion of testimony from late disclosed expert, where expert did not provide all "material discovery" in  
25 response to subpoena duces tecum). *Dempere v. Nelson*, 76 Wn. App. 403, 406, 886 P.2d 219 (Div. 1 1994)  
(affirming trial court's exclusion of expert witness testimony where expert was identified prior to trial but beyond  
the date required for disclosure of expert witnesses in an order on pretrial conference); *M/V La Conte, Inc. v.*  
*Leisure*, 55 Wn. App. 396, 401-402, 777 P.2d 1061 (Ct. App. Div. I 1989) (affirming trial court's exclusion of  
testimony of expert witness identified after first day of trial).

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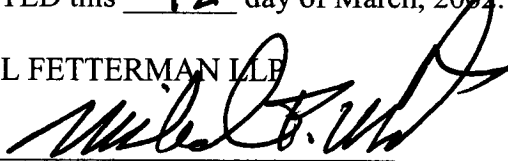
**VI. CONCLUSION**

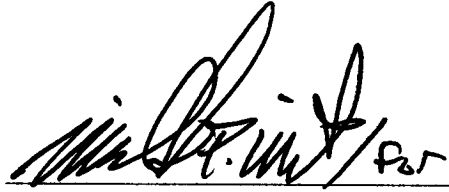
Through the course of the 401 certification process and this litigation, the Port and Ecology have controlled the site, data, and reports regarding the Third Runway Project. In order to pin down the purported bases for Ecology's "reasonable assurance" determination first issued months earlier, the Prehearing Order imposed on the Respondents an obligation to identify and to later produce any plans and reports relied upon as support for the 401. The Embankment Fill Modeling Report (Proposed Exhibit 1320), the new Technical Memorandum regarding wetlands (proposed Exhibit 2055) (and each of the proposed exhibits identified in Exhibit A to the Witek Declaration) are untimely under the Prehearing Order. Accordingly the Board should, per the remedy stated in the Prehearing Order exclude these reports and any Respondent testimony discussing or relying on them, as well as all other untimely plans and reports.

DATED this 12<sup>th</sup> day of March, 2003.

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