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**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 REPLY IN SUPPORT
OF MOTION IN LIMINE
REGARDING WAC 371-08-475(7)

I. INTRODUCTION

On March 4, Ecology filed a Motion in Limine to preclude Thomas F. Luster from testifying as an expert witness on behalf of Appellant Airport Communities Coalition (ACC). In response, the ACC makes four arguments, each of which is without merit. Under the plain language of WAC 371-08-475(7), Ecology's Motion should be granted.

1 **II. AUTHORITY AND ARGUMENT**

2 **A. Mr. Luster Took An Active Part In The Port's Application For A Clean Water**
3 **Act Section 401 Certification**

4 ACC first contends that Mr. Luster "had no active part in the review of the Port's
5 application." ACC's Opposition, p. 2. To make this assertion, ACC separates the Port's
6 October 2000 application from the Port's previous applications regarding the Third Runway
7 project. ACC then contends that Mr. Luster had no role in the October 2000 application
8 review so that he does not fall within the terms of the Board's rule. The Board should reject
9 this argument.

10 First, the ACC's reading of the Board's rule is too narrow. Under the Board's rule, so
11 long as Mr. Luster took "an active part in the investigation as a representative of the
12 Department" he is precluded from testifying as an expert for ACC. There is no question here
13 that Mr. Luster took an active part in the investigation of the Third Runway project application.
14 Mr. Luster repeatedly relies on his role in the project as support for his opinions. In the first
15 sentence of his Pre-filed Testimony, Mr. Luster states:

16 I am submitting my testimony in this matter to provide the Board the benefit of
17 my several years of experience as Ecology's Senior Expert on water quality
18 certifications and my associated experience as the agency's lead reviewer on the
19 certification that is the subject of this appeal.

20 Pre-Filed Testimony of Thomas R. Luster at 1 (emphasis added). Mr. Luster goes on to state:

21 I was expected to fully participate in the agency's review and deliberations on
22 this proposed project, and that I did participate in that manner. I led discussions
23 on various issues with other experts, I was involved in the numerous questions
24 and debates that came up over the course of Ecology's review, and I established
25 various agency positions on both this proposed project and on issues more
26 broadly applicable to 401.

Id. at 2; *see also* at 3 ("I was fully involved as a senior staff member during my several years
of reviewing this proposal").

The Board's rule does not differentiate between different applications for the same
project. It requires only that the employee have participated "in the investigation as a
representative of the Department." Here, by Mr. Luster's own admission, he participated "in

1 the investigation” of this project for several years. Therefore, it is irrelevant that the
2 investigation continued after Mr. Luster left his position with Ecology and it is irrelevant that
3 the Port’s application was renewed in October 2000. The clear intent of the Board’s rule is to
4 prohibit a former employee of the Department from using his experience with a project as a
5 basis for expert testimony, which is exactly what ACC attempts to do here.

6 Moreover, the Port’s renewal of its application in October 2000 was simply designed to
7 give Ecology more time for review of the Port’s proposal as the one year period provided
8 under Clean Water Act § 401 was due to expire. *See* Declaration of Thomas J. Young, Ex. 5.
9 The project proposed in the 2000 application was the same project that was proposed in the
10 previous applications: the construction of a third runway at Seattle Tacoma International
11 Airport and related projects. ACC’s attempt to interpose a dividing line between these
12 applications elevates form over substance.

13 Second, even if such a line can be drawn, Mr. Luster still is precluded from testifying
14 because he continued to take an active part in the investigation even after the Port withdrew its
15 application in September 2000 and renewed the application on October 25, 2000. Mr. Luster
16 participated in several of the facilitated meetings that took place between the Port and Ecology
17 that were designed to resolve issues regarding the Port’s renewed application. These meetings
18 occurred on October 2, 10, 13, and 27, at which the facilitated meeting process was discussed
19 and an outstanding issues list developed. Young Decl., Ex. 4. Mr. Luster also wrote a memo
20 dated October 9, 2000 in which he set forth a “list of issues to be resolved for SeaTac 401
21 review” and he provided a similar memo via email dated October 18, 2000. Young Decl., Exs.
22 6, 7.

23 Mr. Luster was reassigned to other duties on or about October 24, 2000. However, as
24 he described in his deposition, he continued to play a role in the project:

25 Mr. Reavis: Did you continue to play a role after that date with regard to the
26 project?

1 Mr. Luster: I continued my role as the lead 401 policy person for the state. I
2 also had some interaction with Ann Kenny in handing off the project to her and
3 making her familiar with the history and the documents, that sort of thing. I
4 probably talked a time or two with the other people involved, Ray Hellwig and
5 Kevin Fitzpatrick and Erick Stockdale. There may have been some other
6 people as well.

7 Young Decl., Ex. 1, Deposition of Thomas Luster at 149-150 (emphasis added).

8 Thus, ACC's contention that Mr. Luster took no active part in the current application is
9 without merit.

10 **B. Mr. Luster's Testimony Was Offered On Behalf Of The ACC.**

11 ACC next contends that WAC 371-08-475(7) does not apply to Mr. Luster because he
12 is not testifying on behalf of the ACC. This argument is also without merit.

13 The cover page to Mr. Luster's pre-filed testimony states that it is the "Pre-Filed
14 Testimony of Thomas R. Luster Submitted on behalf of Appellant Airport Communities
15 Coalition." Young Decl., Ex. 2. Mr. Luster admits in his declaration submitted in opposition
16 to this motion that his travel expenses will be paid by the ACC and that the ACC "asked me to
17 provide my declarations." Luster Declaration, ¶¶ 2-3. Mr. Luster received documents from
18 ACC's lawyers and conferred with them regarding the case prior to submitting his testimony.
19 Young Decl., Ex. 1, Luster Deposition, pp. 100-103. His declarations previously submitted on
20 the Motion for Stay were submitted on ACC counsel's pleading paper.

21 During the deposition of Mr. Luster, the ACC's counsel asserted that his
22 communications with Mr. Luster were not subject to discovery, whereupon the following
23 exchange occurred:

24 MR. YOUNG: I have one question, which is is it then your position,
25 Peter, that Tom Luster is a retained expert on behalf of ACC?

26 MR. EGLICK: Well, I guess if you want to talk about that, we can go
off the record and talk about it, but I'm not being deposed here. The word
"retained" kind of implies some sort of commercial transaction, and I don't
think that's applicable here.

MR. YOUNG: But you're saying he is your expert for purposes of
asserting work product privilege?

1 MR. EGLICK: Well, he is going to testify on his opinions having been
2 qualified as an expert by Ecology before we ever appeared on the scene. I think
3 Exhibit 202, the third page, Ecology's description of Tom is that he, quote,
4 serves as senior expert to the shorelands and environmental assistance program
5 and the Department of Ecology on technical and policy issues related to section
6 401 of the Federal Clean Water Act, Coastal Zone Management consistency
7 determinations, and coordinated state responses and so on. I guess –

8 MR. YOUNG: He's not working for Ecology now.

9 MR. EGLICK: Right. But you asked me – there are two parts to the
10 question. Once, is he an expert? As far as I know, Ecology described him as an
11 expert – how many years ago is this now, five? – on 401, so, yes, he is an
12 expert, and, yes, we have asked him to testify in the presentation that we will
13 make to the board.

14 Young Decl., Ex. 1, Luster Deposition pp. 105-106.

15 Thus it is clear that Mr. Luster is being offered “as an expert witness on behalf of” the
16 ACC.

17 **C. RCW 42.52.060 Does Not Apply To Mr. Luster**

18 ACC next contends that RCW 42.52.060 authorizes Mr. Luster's testimony so that he
19 falls within the exception in the Board's rule for testimony “permitted by applicable State
20 conflict of interest law.” However, RCW 42.52.060 does not apply here because by its terms it
21 applies only to current state employees. Thus, this argument should be rejected.

22 RCW 42.52.060 states:

23 This chapter does not prevent a state officer or state employee from giving
24 testimony under oath or from making statements required to be made under
25 penalty of perjury or contempt.

26 Mr. Luster, however, is no longer a “state officer or state employee.” Therefore, the statute
does not apply to him. Instead, the statutes relating to former employees apply to Mr. Luster.
See, e.g., RCW 42.52.080(5).

The Executive Ethics Board, in Advisory Opinion 97.06, concluded that RCW
42.52.080(5) prohibits a former Ecology employee from assisting a person in an appeal of a
permit when the employee personally and substantially participated in the permit process while
employed at Ecology. Young Decl., Ex. 3.

1 In this regard, Mr. Luster contends in his declaration that he “informed Ecology
2 management and counsel that I intended to provide such testimony and asked that they let me
3 know if they had any concerns, but I did not hear back from them.” Luster Decl., p. 4. In fact,
4 according to Ray Hellwig and Joan Marchioro, Mr. Luster did not “ask that they let [him]
5 know if they had concerns.” Mr. Luster’s telephone message to Mr. Hellwig was in the nature
6 of a “heads up” that he had already submitted testimony rather than a request for permission to
7 do so. Declaration of Ray Hellwig, Ex. 1. Ms. Marchioro has no recollection of any such
8 conversation with Mr. Luster. Declaration of Joan Marchioro, ¶ 2.

9 **D. Ecology’s Motion Is Timely**

10 Finally, ACC contends that Ecology waived its right to bring this motion because it
11 should have been brought earlier. However, Ecology raised its objection to Mr. Luster’s
12 testimony as soon as his testimony was submitted. Therefore, Ecology’s motion was timely
13 and ACC’s argument should be rejected.

14 WAC 371-08-475(7), titled “Procedures at hearings”, prohibits Mr. Luster from
15 “appear[ing]” as an expert witness “in a formal proceeding.” The rule clearly prohibits Mr.
16 Luster from testifying in person before the Board and therefore also precludes him from
17 submitting pre-filed direct testimony. An objection to evidence is generally timely if raised
18 immediately after the evidence is offered. *See* ER 103(a). Here, Ecology’s motion was timely
19 because it was made as soon as Mr. Luster’s testimony was submitted.

20 ACC argues that Ecology waived its right to bring the motion by not raising the issues
21 at Mr. Luster’s deposition or during the stay proceedings. Arguably, neither Mr. Luster’s
22 deposition nor his stay declarations constituted “appearances” “in a formal proceeding” before
23 the Board. Even if they did, Ecology’s decision not to pursue the matter at those times does
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1 not preclude it from doing so now because Ecology's objection here is to Mr. Luster's trial
2 testimony not to his stay declarations or his deposition.¹

3 Moreover, in ACC's Updated List of Witnesses submitted on November 15, 2001, Mr.
4 Luster was not included in the category titled "ACC Expert Witnesses" rather he was listed
5 under "Other Persons". It was not until Mr. Luster's deposition on February 1, 2002 that ACC
6 disclosed that it considered Mr. Luster as an expert witness. It was also not until Mr. Luster's
7 testimony was actually submitted to the Board by ACC that Ecology could confirm that Mr.
8 Luster was in fact offering opinions.


9 Finally, ACC demonstrates no prejudice resulting from Ecology's alleged delay in
10 bringing the motion. The Board has indicated that the motion will be decided prior to the
11 hearing so that the question of whether Mr. Luster will testify can be resolved before he incurs
12 travel expenses. In the absence of any prejudice, the Board should reject ACC's waiver
13 argument.

14 III. CONCLUSION

15 For the reasons stated above, the Board should grant Ecology's Motion to exclude Mr.
16 Luster's testimony.

17 DATED this 11 day of March, 2002.

18 CHRISTINE O. GREGOIRE
19 Attorney General

20 
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¹ Also, failure to make an objection of this type at a deposition is not a waiver of the objection. CR 32(d); CR30(h).