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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,)
and CITIZENS AGAINST SEATAC) PCHB No. 01-160
EXPANSION,)
Appellant,) OPPOSITION BY ACC AND CASE
v.) TO DEPARTMENT OF ECOLOGY'S
DEPARTMENT OF ECOLOGY and) MOTION IN LIMINE RE WAC 371-
THE PORT OF SEATTLE,) 08-475(7)
Respondents.)

I. INTRODUCTION

Ecology, joined by the Port, has belatedly moved to prevent appearance in this case by Thomas R. Luster claiming that "The Board's rules of practice prohibit such testimony." Ecology's one-page (plus case caption) motion is based only on WAC 371-08-475(7), "Former Employee as an Expert Witness." It does not cite any case law or statute, nor does it offer any evidence that Mr. Luster's appearance falls within the scope of the regulation.¹ In fact, his appearance does not. Further, Ecology and the Port long ago waived any right to claim otherwise.

II. ARGUMENT AND AUTHORITY

A. The Provisions of WAC 371-08-475(7) Do Not Apply to Mr. Luster's Role in This Case.

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¹ If Ecology (or the Port) attempt to meet their burden for the first time on Reply, then ACC requests that the Board either deny Ecology's motion or order that ACC be given a further opportunity to respond.

ORIGINAL

1 WAC 371-08-475(7) provides:
2

3 **Former Employee As An Expert Witness.** No former employee of the Department shall
4 at any time after leaving the employment of the Department appear, except when permitted
5 by applicable state conflict of interest law, as an expert witness on behalf of other parties in
6 a formal proceeding in which an active part in the investigation as a representative of the
7 Department was taken.

8 Ecology has not even made a pretense of meeting its burden of proof that Mr. Luster had
9 “an active part” in the “investigation”² for the current 401 Certification and that he will appear “as
10 an expert witness on behalf of other parties” (emphasis added). Even if Ecology had met these
11 burdens, it has not shown that Mr. Luster’s appearance before the Board is not “permitted by
12 applicable state conflict of interest law.”

13 **1. Mr. Luster Had No Active Part in the Review of the Port Application.**

14 Sworn deposition testimony of Ecology Director Tom Fitzsimmons and of Ecology
15 Northwest Regional Office Director Ray Hellwig confirms that, while Mr. Luster had an active role
16 in review of the Port’s earlier 401 Certification applications, it ended in October 2000 when he was
17 reassigned -- prior to submission of the new application which was ultimately approved in
18 September 2001 and which is currently before the Board on appeal.³ Port counsel confirmed in his
19 deposition questioning of Mr. Luster that he transitioned out of this role during October, 2000, prior
20 to submission of the Port’s new application. *See, e.g.,* Luster Dep. at 156-158 (no longer
21 responsible for Third Runway project in October 2000; new application was to be submitted)⁴; *see*
22

23 ² References to Ecology’s “duty to investigate” are found in the Water Code, RCW 90.03.290, concerning the
24 “appropriation procedure” for water administered by Ecology under that code.

25 ³ Deposition of Thomas Fitzsimmons at 50-52 (Eglick Decl. Ex. A); Deposition of Ray Hellwig at 10-13 (Eglick
Decl. Ex. B).

⁴ Mr. Luster’s February 1, 2002, deposition is Exhibit C to his pre-filed testimony, copies of which have already

1 Luster Decl., attached (“reassigned from the proposed project review in mid-October 2000”; did not
2 serve as the department’s representative in reviewing the Port’s request for water quality
3 certification...left the department in late January 2001.”)⁵

4 **2. Mr. Luster Is Not an Expert Witness “on Behalf” of ACC.**

5 The Board’s October 31, 2001, Prehearing Order required, where possible, that “All direct
6 testimony of witnesses shall be in writing and pre-filed with the Board.” Prehearing Order at 3. Mr.
7 Luster testified at deposition that he has not been engaged or retained by ACC as an expert, is not
8 being compensated for his time by ACC, and has no contractual relationship or other agreement
9 with any party to the case. His attached declaration confirms this:

10
11 My understanding is that my involvement in this appeal has been not to necessarily advocate
12 for any one party, but to provide the Board with the benefit of my experience at Ecology
13 with water quality certifications in general and with this proposed project specifically. I do
14 not have a contractual arrangement with any party in this appeal agreeing to serve as an
15 expert witness, and I am not being paid for my time. I am, however, being reimbursed for
16 some of my expenses in this matter – the Port of Seattle has agreed to reimburse me for
17 travel expenses associated with my deposition; the Washington Public Employees for
18 Environmental Responsibility (PEER) agreed to pay a portion of my attorney fees
19 associated with my deposition;⁶ and the ACC has agreed to reimburse me only for travel
20 expenses associated with the upcoming hearing.⁷

21 ACC could have included Mr. Luster in its presentation to the Board without prefiled
22 testimony, as will be necessary with current Ecology personnel whose testimony ACC anticipates

23 been filed with the Board. Additional copies will be provided to the Board immediately upon request.

24 ⁵ Ecology and the Port have not asserted that a role in Ecology’s review of a prior application constitutes a role in
25 review of the application submitted in late 2000, which Ecology ultimately approved. Were they to do so, then the
participation by former Senior Assistant Attorney General and current Port counsel Jay Manning in this proceeding
would be called into question. See Deposition of Thomas Fitzsimmons at pp. 10-13 (Eglick Decl., Ex. A); State
Ethics Code, RCW 42.52.080(1)(5). Mr. Manning’s direct employment by the Port is in contrast to the independent
role Mr. Luster has maintained in presenting his sworn testimony to the Board. See Declaration of Tom Luster,
attached.

⁶ Mr. Luster had his own counsel at the deposition taken by the Port and Ecology.

⁷ Luster Decl. at ¶ 2.

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1 presenting. Instead, ACC suggested that Mr. Luster provide pre-filed sworn testimony in keeping
2 with the spirit of the Prehearing Order. The testimony includes Mr. Luster's explanation of this
3 participation in his own words:

4 I also wish to briefly clarify some of the reasons that I am continuing to stay involved in
5 this matter. During the majority of my years with Ecology, I worked to help develop its
6 federal permitting program. During the last several years of that time, I spent a
7 significant amount of time reviewing the Port's proposals for the airport expansion. I
8 believe I have a continuing professional responsibility to address the commitments I
9 made to the agency, to the Port, and to the various interested parties regarding my work
10 during that time both to develop water quality certifications as an appropriate regulatory
11 mechanism and to make a defensible decision on this particular proposal. In addition,
12 based on my experience with, and knowledge of, the regulations and practices that apply
13 to this proposed project, I believe that the current certification, if upheld, would result in
14 violations of water quality standards rather than compliance with those standards, and
15 would establish a poor precedent for future certification decisions by Ecology.

16 As a closing comment on my experience and previous involvement with the proposed
17 project, I wish to state again, as I did in my declarations, that I reviewed this proposal
18 from as unbiased a position as I could. I am not now nor was I then a proponent or
19 opponent of the third runway or the airport expansion.⁸

20 Mr. Luster's responses to Port and Ecology deposition questions last month had already
21 established that respondents were barking up the wrong tree in attempting to characterize him as
22 an expert testifying "on behalf" of any particular party, as opposed to out of concern for the
23 Clean Water Act. He testified that he had no contractual relationship with any party in the case,
24 was not being paid and that "there's no arrangement like that." Luster Dep. at 19. He testified
25 that there was no letter in which he was asked "to agree to serve as an expert witness on behalf of
that party." *Id.* He stated that, since leaving Ecology, he had received copies from ACC of some
record documents concerning the recent 401 Certification, but the bare transmittals were devoid

⁸ Luster pre-filed testimony at 3. An original and three copies of Mr. Luster's pre-filed testimony have previously been filed with the Board. Additional Board copies are not submitted with this opposition, but will be supplied immediately upon request.

1 of anything more.⁹ Mr. Luster has consistently advised that he would not testify on behalf of
2 any particular party's point of view:

3 In addition, I have not been involved in helping develop the ACC's strategies in this appeal.
4 In fact, last August when the ACC first asked me to provide my declarations, I informed
5 them that some of my testimony may not be in line with arguments they wished to put
6 forward, and that my main focus would be whether Ecology's review and certification
7 complied with the applicable provisions of the Clean Water Act and state water quality
8 standards. I also informed them that I might decline to offer testimony on various parts of
9 Ecology's review, or that I may find that portions of Ecology's review or certification met
10 the applicable provisions.¹⁰

11 Mr. Luster was designated as a 401 expert by the Department itself -- not by ACC -- years
12 before this appeal occurred, as demonstrated by Mr. Luster's DOE job description which is an
13 exhibit to his deposition:

14 The position is the statewide expert on 401/CZM regulatory issues.

15 Luster Dep. at 192 (emphasis added). In another part of Mr. Luster's DOE personnel papers,
16 Gordon White, the Ecology official who signed the 401 Certification now on appeal before the
17 Board, stated: "Tom has helped me understand 401 – no small accomplishment! And provides a
18 good example to other staff for his diligence and work ethic for the citizens of the state. GW."
19 *Id.* at 194. However, he has not been engaged, retained, or paid nor has he appeared "on behalf" of
20 ACC, as his pre-filed testimony confirms.

21 ⁹ Q: So no memoranda, for example, explaining the theory of the case or outlining the issues?

22 A: No. Nothing like that.

23 Q: To the best of your recollection, then, it was documents with a transmittal letter saying here are documents?

24 A: Correct.

25 Luster Dep. at 102. Mr. Luster also testified that his Stay declarations were all his work: "I don't think I've written
a declaration before these two, so I wasn't sure on the structure and format, that sort of thing. But the words are
mine, and there were a couple minor edits or grammatical corrections, but nothing of substance." Luster Dep. at
108.

¹⁰ Luster Decl., ¶ 3.

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1 **3. Mr. Luster's Testimony is "Permitted by Applicable State Conflict of**
2 **Interest Law."**

3 RCW 42.52.060, part of the State Ethics Law, explicitly authorizes testimony under oath:

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

6 In other words, Mr. Luster's testimony as a witness (and as a witness who, as discussed above,
7 Ecology -- not ACC -- long ago labeled as an expert) could not be barred even if he were still
8 employed by Ecology, let alone now that he is a private citizen.¹¹ No doubt this is why Mr. Luster's
9 informal check with the Executive Director of the State Ethics Board months ago (prior to
10 submitting his Stay declarations) did not result in any red flag being raised. See Luster Decl. ¶ 4
11 (checkered with Executive Director of State Ethics Board).

12 **B. Ecology and the Port Long Ago Waived Any Objections to Mr. Luster's Appearance.**

13 Ecology and the Port have long been aware of Mr. Luster's appearance in these proceedings.
14 He took the trouble to alert Ecology management and counsel to the possibility before he submitted
15 sworn declarations on the Stay proceedings last September, and asked them to let him know if they
16 had any concerns. None were raised. Luster Decl. at ¶4. He has long been on the witness lists.¹²
17 Mr. Luster was deposed on February 1, 2002, at the demand of the Port and Ecology, who directly
18 elicited Mr. Luster's opinions on earlier 401 decisions as well as on the Certifications currently
19 before the Board. See, e.g., Luster Dep. at 159. Just as neither the Port nor Ecology objected under
20 WAC 371-08-475(7) to Mr. Luster's Stay declarations, no such objections were interposed during
21 Mr. Luster's deposition. Both the Stay Declarations and Mr. Luster's deposition appearance
22

23

24 ¹¹ Any other construction of the statute would raise constitutional questions.

25 ¹² Ecology Director Tom Fitzsimmons' deposition testimony confirms that he was aware of Mr. Luster's appearance
before the Board. Fitzsimmons Dep. at 52 (reference to "Tom Luster's so-called expert testimony").

1 occurred in formal sworn proceedings under the Board's aegis. Had Ecology or the Port believed
2 that WAC WAC 371-08-475(7) applied they could -- and should -- have raised it sometime in the
3 last half year.¹³ It is far too late to do so now: any objection has been waived.

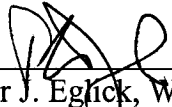
4 III. CONCLUSION


5 Mr. Luster was for years Ecology's "statewide expert" on § 401 issues. He was not
6 assigned to the Port 401 application which is now before the Board. He is not testifying "on behalf"
7 of ACC, but out of his concern for clean water in the state of Washington. Respondents' last-
8 minute efforts to deprive the Board of the benefit of Mr. Luster's testimony, when Mr. Luster first
9 appeared before the Board months ago, is not well taken under WAC 371-08-475(7) and
10 inconsistent with the purpose and goals of a Board hearing and the Board's evidence rules.¹⁴

11 DATED this 7 day of March, 2002.

12
13 HELSELL FETTERMAN LLP

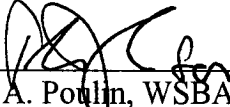
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23 ¹³ The Prehearing Order calls for parties "to try to resolve procedural, discovery or other pre-hearing issues without
24 resorting to the filing of a motion" and requires that any motion filed "shall be accompanied by an affidavit reciting
25 efforts to resolve a dispute" (Prehearing Order at VI(a)), Ecology has not brought to ACC's attention at any time
prior to the filing of its motion any objections to Mr. Luster's appearance.

¹⁴ See, WAC 371-08-500(1); WAC 371-08-480. "[T]he purpose of permitting expert opinion testimony is to assist
the trier of fact in understanding matters not within the common experience of mankind." *Tokarz v. Ford Motor
Co.*, 8 Wn.App. 645, 508 P.2d 1370 (Div. II, 1973). WAC 371-80-480 gives the Presiding Officer of the Board
authority to obtain assistance on technical issues by presenting "such evidence, in addition to that presented by the
parties, as deemed necessary to decide the appeal fairly and equitably."

OPPOSITION BY ACC AND CASE TO
DEPARTMENT OF ECOLOGY'S MOTION IN
LIMINE RE WAC 371-08-475(7)- 7

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