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A Limited Liability Partnership

March 4, 2002

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Peter J. Eglick
Attorney At Law
**ENVIRONMENTAL
HEARINGS OFFICE**

By Fax and Mail

Hon. Kaleen Cottingham
Presiding Officer
Pollution Control Hearings Board
Office of Environmental Hearings
4224 6th Avenue SE
Building 2, Rowe 6
Lacey, WA 98503

Re: PCHB No. 01-160, *ACC v. Dept. of Ecology and Port of Seattle*:

Dear Presiding Officer Cottingham:

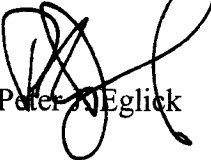
In light of the correspondence last week concerning use of a chess clock during the hearing, enclosed with this letter is a copy of the Verbatim Report of Proceedings in which Thurston County Superior Court Judge Hicks denied the Port's Motion to Set Aside the Board's Stay Order. Judge Hicks explicitly suggested at page 6 use of a chess clock format, with time per "side":

From time to time we get complex cases that counsel estimate can't be done in a four-week time period, or they get ten days and they don't think they can get it done, and we only ten days to give them. Several of the judges -- I'm not the only one -- have done this. We've put what we call a chess clock on and we limit each side. But you have to be clever. We keep track minute by minute and the clerk does, too. If you look at the clerk's minutes, you'll see they can tell you when every witness starts, when the cross-examination starts, when the redirect starts. And we give both sides an equal amount of time, whether they use it up in direct examination or cross-examination, examination or redirect. And we've found that to be very effective. Counsel will be able to see how much water they still have in the pot they're carrying. And usually we bet it done in time. So good luck. [emphasis added]

We provide this to the Board in light of subsequent proposals by Ecology to use a chess clock approach, but on a per-party, rather than per-side, basis.

Sincerely,

HELSELL FETTERMAN LLP



Peter J. Eglick

Enclosure

cc by fax: Counsel of record
g:\lu\acc\pchb\cottingham-030402.doc

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR COUNTY OF THURSTON

PORT OF SEATTLE,) Case No. 01-2-02386-9
Plaintiff,)
vs.)
STATE POLLUTION CONTROL)
HEARINGS, et al,)
Defendant.)

COPY

BE IT REMEMBERED that on February 22, 2001,
the above-entitled matter came on for hearing before
the HONORABLE RICHARD D. HICKS, Judge of Thurston
County Superior Court.

VERBATIM REPORT OF PROCEEDINGS
MOTION TO SET ASIDE

REPORTED BY: Nichole E. Forrest
Official Court Reporter, CCR, RPR

P R O C E E D I N G S

1
2 THE COURT: I'm ready to rule. I've let
3 everybody go on way too long. I've taken up over a
4 half hour on this. I thought this was interesting. I
5 did spend some time, I read the Board's decision and
6 briefs and so on, most of the briefs -- or not most of
7 the briefs, but much in the brief cites to previous
8 Board rulings as opposed to state case law, there is
9 some references to federal cases and so on. And I'll
10 cut to the end remark here.

11 I'm not going to overturn the stay here. I
12 think the Board has the discretion to do what they
13 did. I think they correctly stated the test; they
14 correctly applied the test.

15 But I agree with the Port insofar as they
16 didn't make a specific articulation that the Board did
17 not have a substantial probability of success, but I
18 find that is inferred, though unsaid somewhat like the
19 case Mr. Eglick cites regarding the test for
20 injunctions, although it's a different test than what
21 we're talking about. It's inferred, even though not
22 specifically articulated, by finding that ACC had a
23 likelihood of success.

24 In fact, the Board's own order speaks to
25 this, maybe not as clearly as one would like, but it

1 became pretty clear to me having found that ACC had a
2 likelihood of success. They really didn't address the
3 fact that the Port doesn't have a substantial
4 probability of success in those words, because they
5 assumed that was already folded in to their earlier
6 finding made regarding the applicant.

7 So, then, they went on to address whether the
8 Port also has a likelihood and the issue of
9 irreparable harm. It's a 20-page decision. It
10 clearly was based on reviewing a much larger record,
11 none of which I've had access to, if it has been
12 certified, it hasn't been briefed and so on.

13 And when I look at what the intent of the
14 legislature was here -- to give the Board discretion
15 in a certain limited number of cases to grant stays of
16 these Section 401 environmental permits, they didn't
17 and couldn't have intended that the Board have two
18 full-blown hearings. What would be the point?

19 In those cases in which two full-blown
20 hearings might be called for, they did give the Board
21 the right to not even address the stay argument as a
22 prehearing matter, but fold it into the final hearing
23 itself. The statute specifically says that the Board
24 can put it off till then.

25 Now, what allows the Port to make the

1 argument that they're making -- is that there is not
2 identifiable articulable language that specifically
3 says we do not find the Port has not shown a
4 substantial probability of success.

5 But if in the reading the overall decision
6 that was considered, and I can see that that was
7 considered, then I don't think they have -- even
8 though it might be better housekeeping -- the
9 necessity, nor is it reversible error, for them to
10 have not articulated this statement if the whole
11 decision correctly reflects what was in front of them.

12 So I decline to reverse the Board on this
13 matter. I hope the matter does go in March. This is
14 a matter of immense importance not just to the Port of
15 Seattle but state-wide it seems to me. I can tell by
16 reading the Board's decision that D.O.E. had several
17 creative solutions it came up with -- perhaps with
18 consultants, but adopted by the Department of Ecology
19 -- that will have a state-wide importance and impact
20 way beyond the third runway issue at SeaTac. And I
21 think it should be decided quickly, and then I think
22 it should be certified to the Supreme Court, if
23 they'll take it, or the Court of Appeals.

24 I've said this before. Maybe I sound like
25 I'm trying to make my own life easier, but I don't see

1 any reason for it to tread water and have time out
2 here when no trial judge, whether it's me or someone
3 else, will be given any deference on their decision,
4 because the Court of Appeals or Supreme Court will go
5 right to the original record as they should.

6 So the quick route out of here is to get the
7 Board, which I'm hoping will revisit this issue of
8 noncertifying, once they have a final order even
9 though they've taken the position they're not going to
10 certify the temporary order. If you guys don't ask
11 them to do that and they don't do it on their own
12 motion, we'll put it on our schedule and get to it as
13 soon as we can.

14 MR. EGLICK: Thank you, Your Honor.

15 MR. REAVIS: May I make one clarification? I
16 want to clarify the Court's position on the trial in
17 March because I don't want to hear my statements
18 reported back to me later on.

19 The Port is wanting to go to trial in March.
20 We do want to finish it in March. The only reason I
21 brought up the probability it may not happen is we're
22 dealing with reality here. We're more than happy to
23 have time limits set. We want the trial accomplished
24 in March.

25 THE COURT: I didn't mean it tongue and

1 cheek. I have a four-week civil trial month. From
2 time to time we get complex cases that counsel
3 estimate can't be done in a four-week time period, or
4 they get ten days and they don't think they can get it
5 done, and we only have ten days to give them. Several
6 of the judges -- I'm not the only one -- have done
7 this. We've put what we call a chess clock on and we
8 limit each side. But you have to be clever. We keep
9 track minute by minute and the clerk does, too. If
10 you look at the clerk's minutes, you'll see they can
11 tell you when every witness starts, when the
12 cross-examination starts, when the redirect starts.
13 And we give both sides an equal amount of time,
14 whether they use it up in direct examination or
15 cross-examination, examination or redirect. And we've
16 found that to be very effective. Counsel will be able
17 to see how much water they still have in the pot
18 they're carrying. And usually we get it done in time.
19 So good luck.

20 MR. EGLICK: May I hand up to the order on
21 consolidation that you had asked us to prepare last
22 week?

23 THE COURT: I did. Has everybody signed off?
24 I asked to redo the caption.

25 MR. EGLICK: Everyone has, and we did redo

1 the caption.

2 (Proceedings concluded.)
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