

January 15, 2002

Law Offices  
**HELSELL**  
**FETTERMAN**  
A Limited Liability Partnership

RECEIVED  
JAN 16 2002  
Peter J. Eglick  
Attorney At Law  
**ENVIRONMENTAL  
HEARINGS OFFICE**

**Sent via 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*:  
**Port's Request for Emergency Status Conference**

Dear Presiding Officer Cottingham:

The Port's "emergency request for status conference" is ill-advised. A conference would not be appropriate until ACC has submitted its response briefs to the Port's lengthy motions (which are due on Thursday, January 17), and until the Board has had at least a day to review those responses. A rush to judgment in an "emergency" status conference will unfairly advantage the Port, which has piled the Board's desk high (once again, in violation of the prehearing order page limits and formatting requirements) with misrepresentations of the facts and the law.

The basic problem here is that the Port's attorneys and experts, and Ecology's attorneys and experts, have all been on the site -- more than once. Every Ecology staffperson who has been asked (e.g., in deposition or otherwise) has endorsed the need for a site visit to get the project and proposal in context and to gain a better understanding of the Port's application and Ecology's decision. These site visits have occurred without the preconditions which the Port seeks to impose on ACC and without undue restrictions on where the visitors could go or what they could observe. Many have occurred after September 11.

ACC worked with the Port on scheduling expert depositions on the explicit basis that ACC would have site access before the depositions. The Port is now insisting that depositions proceed without keeping its end of the bargain and allowing site access to ACC. Why should ACC counsel and experts not be permitted to participate in the depositions on a level playing field, so that, for example, when counsel asks a question concerning fill locations or the effect of the proposed Great Wall on streamflow, it will be based at least on some familiarity with the site?

The Port's motion justifying its refusal to do so and demanding that depositions proceed nonetheless is an astonishing collection of factual misrepresentations and misstatements of the law. ACC will brief this fully in our response, which is due on Thursday. It is no wonder, then, that the Port tells the Board now, after submitting its own (overlength) gloss, "that little will be gained from briefing." The Port could have said this and requested a status conference before submitting its own motions and briefing.

**ORIGINAL**

Any emergency here is of the Port's making. Deciding this issue and its effect on the hearing date without allowing ACC a full opportunity to respond would be to the Port's strategic advantage, but would do no justice to the process.

Similarly, the Port's claims concerning document discovery give (less than) half the story. This is a case in which all of the important facts and documents -- as well as the site -- are wholly within the Port's and Ecology's control. ACC has no documents on the Port's 401 application or Ecology's certification except for the ones we have received from Ecology (which the Port has as well), and our expert comments, submitted to Ecology, which the Port has had all along. What the Port is really complaining about is, apparently, its attempt to obtain attorney-client privilege and work-product documents (e.g., drafts of documents, communications with attorneys) which are not subject to discovery. Port counsel advised ACC counsel months ago in writing that such materials were not subject to discovery. The Port's motion ignores all of that -- and the law -- as our response brief will explain. The Port's demand for an "emergency" conference on document production is, therefore, as with its other demand, apparently to obtain a ruling before the Board has been fully advised.

Finally, the Port's demands for a conference on January 16, 17, or 18 cannot be accidental. Depositions continue of Ecology personnel.<sup>1</sup> Two are scheduled for the 16th, one for the 17th, and another for the 18th. All the parties are scheduled to be in Thurston County Superior Court on the 18th on motions and matters arising from the Port's appeal of the Board's stay decision. ACC is also due under the prehearing order to submit its responses to the Port's discovery motions on Thursday, the 17th. None of these dates are therefore convenient for a conference, nor are they necessary. There is a briefing schedule established under the Prehearing Order which will present the Board with complete briefing and an opportunity to make a decision at an early point. The Port's attempt to have the Board make a decision without being fully informed is not appropriate.

Respectfully,

  
FISSELL FETTERMAN LLP

Peter J. Eglick

cc: Gil Reavis/Jay Manning  
Joan Marchioro/Thomas Young/Jeff Kray  
Linda Strout/Traci Goodwin  
Roger Pearce/Steven Jones  
Rachael Paschal Osborn  
Richard Poulin

g:\u\acc\pchb\cottingham-011502.doc

---

<sup>1</sup> Acc has proceeded with these depositions as a courtesy to Ecology and because Ecology staff were not the authors of the expert reports on which the 401 Certification purports to rely, but simply reviewed them.