

POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION, )  
Appellant, ) PCHB 01-160  
v. ) ORDER ON MOTION TO RECONSIDER  
STATE OF WASHINGTON, ) MOTION TO STRIKE  
DEPARTMENT OF ECOLOGY and THE )  
PORT OF SEATTLE, )  
Respondents. )

On October 10, 2001, the Board granted the Department of Ecology's (Ecology's) motion to strike certain references to a document relied on in the Appellant Airport Communities Coalition (ACC) motion for stay and supportive reply materials. The Appellant has asked the Board to reconsider its ruling on the motion to strike. The Board has granted that request.

The basis for the motion to strike was the attorney-client privileged nature of the communication contained in the document at issue and its inadvertent disclosure. Ray Hellwig, Ecology's NW Regional Director, prepared the document in question as a briefing paper for a senior management team meeting in April 2001. The document contained a reference to advice from an Assistant Attorney General regarding a particular issue. While this issue is part of the appeal before the Board, it is a legal question on which the Board will decide based on the information and briefings put forth by the parties, not based on one party claiming the other party's lawyer is on their side.

1           The initial disclosure request occurred prior to Ecology’s decision on the § 401  
2 certification. The document in question was exempted from disclosure partially because it was  
3 attorney-client privileged and partially because it was deliberative and thus exempt for disclosure  
4 until a final decision was made on the certification. Once the decision was made on the § 401  
5 certification, the deliberative process exemption no longer applied and Ecology was required to  
6 disclose the part of the document related to its deliberations. The document was intended to  
7 have certain paragraphs redacted before disclosure, but instead an un-redacted copy was  
8 inadvertently inserted into the packet of documents disclosed as part of fulfilling a public  
9 disclosure request.

10           The Board’s earlier order granting the motion to strike was based on the Public  
11 Disclosure Act, Chapter 42.17 RCW, which allows an agency to exempt records from disclosure  
12 if those records would not be available to another party under the rules of pretrial discovery for  
13 causes pending in the superior courts, including attorney-client privileged communications.  
14 RCW 42.17.310(1)(j). Although the privilege can be waived voluntarily, it is not waived if the  
15 mistaken disclosure of the privileged information was “sufficiently involuntary and inadvertent  
16 as to be inconsistent with a theory of waiver.” *United States v. Zolin*, 809 F.2d 1141, 1415, 1417  
17 (9<sup>th</sup> Cir. 1987). Ecology met its burden of showing that it intended to redact and not disclose  
18 certain privileged information and as a result Appellants should not be allowed to benefit from  
19 this error.

20           In the earlier order, however, the Board ordered the Appellants to return the attorney-  
21 client privileged document to Ecology and refrain from using the information. Additionally, the

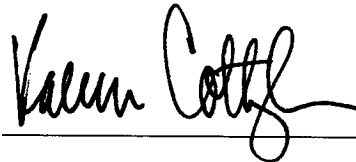
1 Board instructed Ecology to inform the board where in the current submittals reference exists to  
2 this document so that all references to the information can be stricken from the record. This  
3 Board does not have the authority to order the return of a document procured under the Public  
4 Disclosure Act. Therefore, on reconsideration, the order is modified so that the Appellant is to  
5 refrain from using the inadvertently disclosed attorney-client privileged information.

6 ORDER

7 Appellant is to refrain from using the inadvertently disclosed attorney-client privileged  
8 information.

9  
10 SO ORDERED this 26<sup>th</sup> day of November, 2001.

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12 POLLUTION CONTROL HEARING S BOARD

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16 KALEEN COTTINGHAM, Presiding