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POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

AIRPORT COMMUNITIES COALITION,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF
ECOLOGY and THE PORT OF SEATTLE,

Respondents.

PCHB No. 01-160

PRE-HEARING ORDER

On August 23, 2001 appellant Airport Communities Coalition (“ACC”) filed a request for review with the Pollution Control Hearings Board (“Board”) of a combined certification under section 401 of the federal Clean Water Act and order under chapter 90.48 RCW (the “401 Certification”) issued by respondent Washington Department of Ecology (“Ecology”) to respondent Port of Seattle (the “Port”). Ecology subsequently rescinded the 401 Certification and reissued an amended one on September 21, 2001, which ACC appealed on October 1, 2001. A pre-hearing conference was held on October 15, 2001. Kaleen Cottingham presided for the Pollution Control Hearings Board.

1 A witness' expertise shall be established by résumé offered as an exhibit in lieu of
2 testimony regarding qualifications. Parties may review an expert's qualification by way of brief
3 introduction during oral direct examination.

4 **IV. PRELIMINARY EXHIBITS**

5 The parties presented preliminary exhibit lists at the pre-hearing conference but were
6 urged to review those lists and identify specific documents rather than documents by category,
7 and were also urged to eliminate potentially unnecessary or duplicative exhibits. The parties
8 shall file and serve updated preliminary exhibit lists by **November 15, 2001**.

9 On or before **November 15, 2001**, respondents Ecology and the Port shall identify all
10 plans and reports (other than ministerial documents) prepared or expected to be prepared
11 pursuant to the §401 Certification and which either Ecology or the Port intends to rely upon at
12 the hearing. For those plans and reports that are complete as of November 15, 2001,
13 Respondents shall provide copies to Appellant ACC on or before **November 15, 2001**. For those
14 plans or reports expected to be completed between November 16, 2001 and February 1, 2002,
15 Respondents shall identify the estimated completion dates. If those plans and reports are
16 completed on or before February 1, 2002, Respondents shall provide copies to Appellant ACC
17 when complete. Ecology and the Port are prohibited from relying at the hearing upon any plan
18 or report prepared after November 15, 2001 unless such plan or report is noted on the above-
19 required list. Even if noted on the list, Ecology and the Port are prohibited from relying at the
20 hearing upon any plan or report prepared after February 1, 2002. Notwithstanding the
21 timeframes established below for discovery, the parties shall be allowed additional discovery on

1 documents identified on the list for completion between November 16 and February 1st. Such
2 additional discovery shall be allowed until **February 28, 2002**.

3 Final exhibit lists shall be served on the parties and filed with the Board by **February 8,**
4 **2002**. The parties shall exchange exhibits by **February 8, 2002**. The parties are directed to meet
5 in person prior to **March 8, 2002** for the purpose of attempting to stipulate to exhibits'
6 authenticity and admissibility and to remove any duplicative exhibits. The final exhibit list,
7 marked to show which exhibits shall be admitted by stipulation, shall be submitted to the Board
8 on or before **March 8, 2002**. In addition to filing the exhibit lists with the Board, the parties
9 shall submit an electronic copy of the final exhibit lists to the presiding officer at
10 kaleenc@eho.wa.gov. Parties are encouraged to offer only those exhibits, or portions, they
11 intend to rely upon in their case. Even though the parties may stipulate to the admissibility of
12 exhibits, the exhibits generally should be offered through a witness at the hearing. It is not
13 necessary for the witness to lay a foundation for any exhibit to which admissibility has been
14 stipulated.

15 When meeting with the presiding officer on the first hearing day, each party shall have
16 available for the Board an original and three (3) copies of its exhibits and exhibit lists which
17 shall identify those admissible by stipulation of the parties. An original and one copy of any
18 exhibit that cannot be conveniently copied due to size, bulk, reproduction difficulty, etc., must be
19 available for the Board at the hearing.

20 Each exhibit shall be pre-marked and organized by tab for identification (A-1, A-2, etc.,
21 for appellant, E-1, E-2, etc., for respondent Ecology, and P-1, P2, etc., for respondent Port) and

1 so identified on the exhibit lists. The number given to an exhibit does not limit the order of its
2 introduction at hearing. The exhibits must be bound in 3-ring binders to keep them organized
3 and it is recommended that the parties coordinate before hand so that the binders are easy to
4 distinguish, either by distinctive labels or color.

5 Any exhibit listed by one party may be introduced by another party.

6 **V. DISCOVERY**

7 The discovery deadline is **February 1, 2002**, except as noted above for plans or reports
8 completed between November 16, 2001 and February 1, 2002. Written discovery requests shall
9 be served in a manner to allow response by the discovery deadline. All discovery shall be
10 conducted in accordance with the Superior Court Civil Rules. If requested by another party,
11 employees of the parties (including employees of members of appellant ACC) and witnesses
12 whose testimony a party has proffered by declaration shall be made available for deposition by
13 the employer or proffering party without necessity of a subpoena. In such instances, a notice of
14 deposition shall have the same effect as a subpoena. This requirement shall extend to production
15 of documents requested by a party that are relevant to the witnesses' testimony or the subject
16 matter of this case. Depositions of non-party deponents shall, absent agreement by all parties
17 and the witness, occur at a mutually acceptable location or, if agreement cannot be reached, at a
18 location near the residence or workplace of such witness. For out of state deponents, if mutual
19 agreement cannot be reached on the location for the deposition, such deposition shall occur at the
20 Board's office in Lacey. The parties may conduct telephonic depositions by agreement. The
21 parties shall cooperate in scheduling depositions and other discovery.

1 Pre-hearing Briefs are limited to 30 pages in length, including attachments. If a motion
2 to lengthen is contemplated, it shall be filed and served in sufficient time for the Board to rule
3 before the deadline.

4 If a citation is made to a case other than a PCHB decision, Wn. App. or Wn.2d, a
5 complete copy of the referenced citation must be attached to the brief, motion or memorandum.

6 **VIII. COMMUNICATION**

7 All correspondence and filings with the Board shall be sent to the attention of the
8 presiding officer with copies sent as required below.

9 **IX. MISCELLANEOUS**

10 "Filed and served" means the date received by the Board. "Date of receipt" means the
11 date actually received by the counsel for the party, as evidenced by a mail receipt date stamp or
12 telefax receipt date notation.

13 Service and filing of papers may be by telefax for papers 10 pages or less including
14 attachments, provided that the original and required number of copies is mailed the same day. If
15 telefax is used to file with the Board, it shall also be used to serve the other parties so that the
16 date of receipt is the same.

17 The standards of General Rule 14 adopted by the Supreme Court regarding paper size and
18 formatting shall apply to all papers filed with the Board. In addition, the parties shall not
19 manipulate document fonts or line spacing to attempt to crowd more words on each page. The
20 font size shall be 12 points and the line spacing shall be double, except when blocking a
21 quotation.

1 All correspondence with the Board shall be sent to the attention of the presiding
2 officer with copies sent at the same time to all parties. Requests for *ex parte* relief will not
3 be granted without allowing all parties an opportunity to be heard unless the moving party
4 satisfies the Board that unusual or exigent circumstances exist preventing the giving of
5 notice and an opportunity to be heard.

6 **ORDER**

7 This order shall govern the proceedings, unless subsequently modified by order of the
8 Board for good cause upon a party's motion or the Board's volition.

9 SO ORDERED this 30th day of October, 2001.

10 **POLLUTION CONTROL HEARINGS BOARD**

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15 **KALEEN COTTINGHAM,**

16 Presiding
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RANDI R. HAMILTON, CCR
Gene Barker & Associates, Inc.
Certified Court Reporters
406 Security Building
Olympia, Washington 98501
(360) 943-2693

RECEIVED

OCT 25 2001

October 24, 2001

ENVIRONMENTAL
HEARINGS OFFICE

Robyn Bryant
Administrative Assistant
ENVIRONMENTAL HEARINGS OFFICE
4224 Sixth Avenue SE
P.O. Box 40903
Olympia, Washington 98504-0903

Re: ACC vs. DOE/Port of Seattle
PCHB 01-133

Dear Robyn:

Enclosed please find the original transcript
of the Prehearing Conference held in the
above-entitled matter on October 15, 2001.

I am forwarding the original transcript to
you at the request of appellant's attorney,
Kevin Stock, in order to be available for
Kaleen Cottingham's review.

Sincerely,



Randi R. Hamilton
Court Reporter

cc: Kevin Stock/Peter Eglick/Rachael Paschal Osborn
Thomas Young/Joan Marchioro
Roger Pearce/Gillis Reavis/Traci Goodwin

AR 006221

1 BEFORE THE POLLUTION CONTROL HEARINGS BOARD

2 STATE OF WASHINGTON

RECEIVED

OCT 25 2001

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4 AIRPORT COMMUNITIES COALITION,)

5 Appellants,)

6 vs.)

7 DEPARTMENT OF ECOLOGY and)
8 THE PORT OF SEATTLE,)

9 Respondents.)

ENVIRONMENTAL
HEARINGS OFFICE

PCHB No. 01-133

ORIGINAL

10
11 PREHEARING CONFERENCE

12 October 15, 2001
13 Lacey, Washington

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21 Randi R. Hamilton, CCR
22 Certified Court Reporter
23 CCR No. HAMILRR470D6
24 GENE BARKER & ASSOCIATES, INC.
25 406 Security Building
Olympia, Washington 98501
(360) 943-2693

1 BE IT REMEMBERED that a prehearing conference was
2 held in the above-entitled matter at the Environmental
3 Hearings Office, 4224 Sixth Avenue Southeast, Building
4 No. 2, Lacey, Washington, on October 15, 2001.

5 This matter came on before the State Pollution
6 Control Hearings Board, Board Member KALEEN COTTINGHAM,
7 Presiding.

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A P P E A R A N C E S

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For the Appellants:

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PETER J. EGLICK
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RACHAEL PASCHAL OSBORN
Attorney at Law
2421 West Mission Avenue
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For the Respondent DOE:

THOMAS J. YOUNG
JOAN MARCHIORO
Assistant Attorneys General
Department of Ecology
P.O. Box 40117
Olympia, Washington 98504

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A P P E A R A N C E S (Continued)

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For the Respondent Port
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TRACI GOODWIN
Senior Port Counsel
Port of Seattle
2711 Alaskan Way (Pier 69)
Seattle, Washington 98111

1 OCTOBER 15, 2001

2 LACEY, WASHINGTON

3 11:40 A.M.

4 <<<<>>>>

5
6 MS. COTTINGHAM: The purpose this
7 morning is to do two things: primarily, the
8 procedural stuff setting forth the calendar that
9 will work towards the hearing in March, maybe a
10 discussion, if everyone is available for March,
11 whether you want to do it then or whether there's
12 going to be any need for a delay or change of
13 timing, we need to know now. Our schedule is
14 pretty much booked through June right now, so just
15 have a discussion about that; also to set all the
16 intermediate discovery points and motion practice.

17 Also procedurally I'd like to talk about
18 generally we have a schedule for dispositive
19 motions that routinely has a filing of a motion, a
20 ten day, seven day, etcetera, and I'd like to maybe
21 talk about, since what I've seen over the last
22 couple of weeks is a distinction between
23 dispositive motions and procedural motions, that
24 perhaps we can by agreement come up with a more
25 rapid schedule of dealing with the nondispositive

1 motions. But I'd like to do it by agreement here.

2 And then the last thing I'd like to do, and
3 it's probably the most time-consuming part of this
4 morning, is to reach agreement on the issues that
5 are in the case. And we have two ways of doing it.
6 We can sit and wordsmith here, or I can take the
7 documents, go back and wordsmith, or probably the
8 best one would be to ask you to all by agreement
9 reach a stipulated set of issues.

10 So either it's the most time-consuming part of
11 our conference this morning or the least
12 time-consuming, if you choose that latter approach.

13 So that's really what I need from you this
14 morning, and I'd like to know if you need anything
15 from each other or from me this morning.

16 MR. REAVIS: What I'd like to point
17 out is that we took a crack at doing some pretrial
18 deadlines and also dealing with issues like
19 dispositive motions and how much time is necessary,
20 and I drafted --

21 MS. COTTINGHAM: Is it in what you've
22 submitted already?

23 MR. REAVIS: No. We did it over the
24 weekend, and I brought it and just gave a copy to
25 ACC's counsel just after the break.

1 MS. COTTINGHAM: If we can take a
2 break right now, I could have copies made of that
3 if that would be of interest.

4 MR. PEARCE: I think we have enough.

5 MR. REAVIS: There's the original, I
6 think. Whoever doesn't have one, I have extras.

7 MS. COTTINGHAM: Everybody has a copy
8 of this? Okay.

9 So I would suggest the first question is, are
10 the dates for the hearing acceptable to everyone?
11 They're March 18th through the 29th, and as you'll
12 recall, I held two complete weeks, but as we get
13 closer to the time, maybe even starting now, but as
14 we get closer to the time, I'm going to need a
15 better estimation from all of the parties as to how
16 much time you actually need to put on your case, so
17 that if it's less than ten full hearing days, that
18 we know that in advance so we can make plans for it
19 here.

20 So do those dates work for everyone, no
21 conflicts; you think you can be prepared by that
22 point in time?

23 MR. REAVIS: Well, I guess that sort
24 of depends on the schedule here, and, you know, I
25 don't know that we've determined whether we can or

1 can't finally be prepared, but in penciling out
2 these dates, it's pretty tight, especially given
3 the number of witnesses that have been identified.
4 I think that appellants identified forty-some-odd
5 witnesses and extras, and Ecology's and the Port's,
6 so I think some of the pretrial discovery issues
7 are going to take some time.

8 What I tried to do in this document was back
9 up from the hearing date a couple of months for a
10 discovery cutoff, just so you can have time to file
11 dispositive motions after the close of discovery
12 and then have some opportunity to get a ruling on
13 those before you decide whether you have to go to
14 trial.

15 What that does is put the discovery cutoff in
16 the middle of January, which gives us roughly
17 essentially three months to complete discovery. In
18 the middle of that, there's Thanksgiving,
19 Christmas, and so I think scheduling may be an
20 issue.

21 And I think it depends on how many witnesses
22 we decide are actually going to be at the hearing
23 as opposed to people who are simply potential
24 witnesses. So I don't think we know yet how many
25 depositions will be taken, but it seems to me that

1 we're on a pretty tight schedule here, and it may
2 or may not be possible to complete that.

3 MR. STOCK: As far as ACC is
4 concerned, an early hearing date is critical.
5 That's why we've brought a motion for stay. We
6 want an early decision on the merits of this
7 matter, and so we very much want to stick to the
8 March 18 hearing date. It is going to be a tight
9 discovery schedule.

10 What I think we ought to do, given we just
11 received this a few minutes ago, is use
12 Mr. Reavis's proposed order as an outline to go
13 over today, and then the parties can reach
14 agreement here on some issues and then we submit an
15 agreed scheduling order to you rather than rely
16 upon this as a final order today.

17 MS. COTTINGHAM: If you would care to
18 caucus at this point in time, we have another
19 conference room that you're welcome to take over,
20 if you want to go discuss the proposed schedule
21 first before we have this discussion.

22 MR. STOCK: We've had a general
23 discussion, and we're prepared to move forward, and
24 I've got some proposed dates. Some of them are the
25 same as what Mr. Reavis has proposed here. Others

1 are off by a week or two, and I think through
2 discussion here we'll be able to agree upon those
3 dates.

4 One critical issue that is important to us
5 that I don't see in Mr. Reavis's proposed schedule
6 is a deadline by which Ecology and the Port are
7 required to submit any plans they are going to rely
8 upon to argue reasonable assurance at the hearing,
9 and ACC would propose a cutoff date of November 15
10 for that purpose. So any plans that the Port is
11 going to submit to try to establish reasonable
12 assurance should be submitted by November 15.

13 The reason why that's important is our experts
14 need time to review any additional material that
15 Ecology seeks from the Port, and the 401 has
16 already been issued, so we would ask that the
17 scheduling order have a cutoff date for that
18 purpose.

19 MS. COTTINGHAM: Just for the purpose
20 of using them at the hearing, not for purposes of
21 complying with their obligations or conditions
22 under the 401?

23 MR. STOCK: Right. Anything after
24 that cutoff date of November 15 cannot be relied
25 upon at the March 18 hearing for purposes of trying

1 to establish reasonable assurance.

2 MS. COTTINGHAM: How does the Port or
3 Ecology feel about that?

4 MR. PEARCE: Well, it doesn't make a
5 lot of sense to have a cutoff date for one set of
6 exhibits and not for other sets of exhibits. I
7 mean, our experts are also going to have to respond
8 to the expert reports prepared by ACC's experts. I
9 think we should have the same date for everyone for
10 a final witness list. And some of the submittals
11 in the 401 are actually not required until after
12 November the 15th, I believe. They're later in
13 November.

14 So, I mean, that would be a hardship on us.
15 There's no reason why it shouldn't be the same date
16 for everyone. I don't think it needs to be as
17 early as November the 15th for final exhibit lists.

18 MR. STOCK: This points out a very
19 critical issue in this case. We're not talking
20 about exhibits in the ordinary course, whether
21 they're documents previously drafted and written
22 and disclosed pursuant to a public disclosure
23 request. What we're asking is that the Board set a
24 deadline date by which all plans that the Port
25 plans to submit to Ecology to try to get Ecology to

1 reasonable assurance be done by November 15.

2 Actually, all of those plans should have been
3 submitted by August 10, when the original 401
4 certification was issued. There was a rescission
5 and a reissuance, so the next date was
6 September 21. What we're asking is, for there to
7 be a full and fair hearing on whether the 401
8 certification is based upon reasonable assurance,
9 that anything submitted after November 15 not be
10 allowed to be relied upon at the March 18 hearing
11 for purposes of trying to establish reasonable
12 assurance.

13 MR. PEARCE: To me, it's an arbitrary
14 deadline, Your Honor. There's no reason for that.
15 There's also things completely beyond the Port's
16 control. One condition, for example, in the 401
17 says that if the Corps of Engineers requires you to
18 change the Natural Resources mitigation plan, which
19 is entirely possible, we have to change that
20 Natural Resources mitigation plan and submit it to
21 Ecology.

22 So there are a lot of things that are beyond
23 our control and may go well past November 15th.

24 MR. REAVIS: And we have sort of a
25 fundamental problem here, I think. The way the

1 issue is phrased in any documents that we intend to
2 rely on to get Ecology to reasonable assurance.
3 Obviously our position is that Ecology has
4 reasonable assurance. There will be documents that
5 are submitted in the future, but our position is
6 that, you know, reasonable assurance has been
7 reached.

8 For example, you have monitoring reports that
9 go on periodically, and at the hearing we're going
10 to want to offer the data perhaps and say, well,
11 see, actually what Ecology believed to begin with
12 is actually working after construction has begun;
13 therefore that is reasonable assurance, the
14 monitoring plan being part of that.

15 So I don't think there is an arbitrary or a
16 way to decide what is or is not supportive of
17 reasonable assurance, and I think it would be very
18 difficult to try to establish a separate deadline
19 for that apart from the exhibit deadline.

20 MR. STOCK: Not to perpetuate the
21 issue, because I'm sure you understand it by now,
22 but just by way of brief reply, what Mr. Reavis
23 just says I think illustrates the point very well.
24 He says that Ecology already has reasonable
25 assurance. Well, if that is the case, then no

1 document submitted after September 21 should be
2 used on March 18 for purposes of establishing that
3 Ecology had reasonable assurance when it issued the
4 401 certification, and neither the Port's lawyers
5 nor Ecology's lawyers should have any difficulty
6 with that position if they truly believe that
7 Ecology had reasonable assurance on September 21,
8 when that certification was issued.

9 MS. COTTINGHAM: Now, we're talking
10 about documents that had due dates in the
11 certification as part of conditions?

12 MR. PEARCE: I don't know what he's
13 talking about. There are a lot of documents that
14 have due dates.

15 MS. MARCHIORO: It's unclear what he's
16 referring to.

17 MR. STOCK: I don't mean to be
18 unclear. I want to make sure that on March 18,
19 when we are confronted with plans, those plans,
20 that either Ecology or the Port doesn't submit a
21 plan to this Board dated after either September 21
22 or November 15, and we can talk about the date, but
23 doesn't submit a --

24 MS. COTTINGHAM: Let's define plan,
25 because I heard monitoring reports, which are, I

1 think, different than a plan.

2 MR. REAVIS: Construction drawings,
3 for example.

4 MR. STOCK: For example, any revision
5 to the low flow mitigation analysis, the low flow
6 plan, any revision or additions to the stormwater
7 management plan or Natural Resources mitigation
8 plan or any changes to the fill criteria.

9 MS. COTTINGHAM: So let me ask a
10 question, then. Are there any plans under way to
11 modify any of those unless, as you mentioned,
12 required by the Army Corps of Engineers?

13 MS. MARCHIORO: I believe that the 401
14 requires certain things to be submitted, and
15 they're based on a time from a point in time going
16 forward: Within 30 days of the issuance of the
17 401, "X" will occur.

18 I can't tell you precisely what those -- it's
19 the taking of the conditions and the clarification
20 that Ecology asked for in the 401, having those
21 then be folded into the final document.

22 But I don't know that November 15th becomes
23 some magical date. It seems to me that if we
24 followed along what the 401 says, that was what
25 Ecology required of the Port, and that's what

1 should be followed, as far as when those designs
2 are provided, as we've always done, we've turned
3 them right over to the ACC.

4 MR. PEARCE: There are 30-day
5 deadlines, 45-day deadlines, 60-day deadlines, and
6 if Ecology asks for other comments, those plans
7 might even change.

8 I would point out this is a de novo proceeding
9 to the Board.

10 MS. COTTINGHAM: I'm just trying to
11 get all this clear. So is your issue so that you
12 can have the opportunity to have your depositions
13 cover anything of merit, or is it preparing your
14 witnesses for the case? If it's the preparation,
15 there might be a different deadline than if it's
16 the deposition aspect.

17 MR. STOCK: Well, it's both, but
18 clearly the deposition aspect also has an impact
19 upon the dates, because if there is going to
20 continue to be a moving target all the way up to
21 March 18, then I think that provides a clear signal
22 and answer to the Board that there is no reasonable
23 assurance. There certainly wasn't back on
24 September 21.

25 ACC's preference is to drop the iron curtain

1 now and to say that nothing after September 21,
2 when the 401 was issued, should be presented or
3 considered by the Board for purposes of deciding
4 whether there was reasonable assurance when the 401
5 certification was issued.

6 I think that is a matter of common sense and a
7 clear reading of the Clean Water Act. Ecology had
8 to have reasonable assurance on September 21, when
9 it issued that 401 certification. So any document
10 submitted after that date, even those documents
11 specified in the certification itself, can't be
12 relied upon to come to the conclusion that there
13 was reasonable assurance.

14 MR. EGLICK: I know I said I wouldn't
15 say anything, but can I say something?

16 MS. COTTINGHAM: Yes.

17 MR. EGLICK: You know, I think the way
18 the 401 works also is that they get a year, and
19 then when the year is up, they have to reapply. I
20 mean, I know that's the way it works, because
21 that's why they didn't make it last year, they had
22 to withdraw, because they weren't able to make
23 their case for 401, so they withdrew it and
24 reapplied.

25 And that's another reason that I think this

1 can't be the kind of iterative process, especially
2 because it will make an appeal of the 401 really
3 hard. I mean, then when do we know that we
4 actually know what we're appealing?

5 MR. PEARCE: Your Honor, Mr. Eglick is
6 incorrect. Ecology has a year from the date of the
7 JARPA notice to make a decision on the 401. The
8 401 lasts, it doesn't expire after a year.

9 MR. EGLICK: No, that's not my point.
10 My point is that the application, what you said, is
11 it's a year from when you apply.

12 MR. PEARCE: That they have to make a
13 decision.

14 MR. EGLICK: Right.

15 MR. PEARCE: But they made a decision.

16 MR. EGLICK: And if they've made a
17 decision, I guess what I'm saying, and I apologize
18 because I've got ibuprofen and cold medication
19 coursing through my veins, but I think if they've
20 made a decision, it's not right then that they can
21 keep on in effect making a decision up until the
22 day we have an appeal.

23 MR. PEARCE: Well, ACC is arguing that
24 you ought to change your procedural rules, Your
25 Honor. This is a de novo proceeding before this

1 Board. New evidence can come in, new testimony can
2 come in. The question is whether there is
3 reasonable assurance. If there's any additional
4 evidence about that that's relevant, the Board
5 needs to hear it.

6 We're happy to work on an exhibit deadline
7 that gives their witnesses and our expert witnesses
8 enough time to get ready for the hearing so we
9 don't waste your time and waste their time.

10 MS. COTTINGHAM: And what would you
11 propose is reasonable?

12 MR. PEARCE: We have the 25th of
13 January for a final exhibit schedule. We can move
14 that back a few weeks or a couple weeks if the
15 parties want.

16 MR. STOCK: What Mr. Pearce is arguing
17 for is that the Board be allowed to consider any
18 evidence created after September 10 to support a
19 finding of reasonable assurance on September 10,
20 and just as a matter of logic, that makes no sense.

21 MR. YOUNG: That's a legal argument.

22 MR. PEARCE: As a matter of
23 controlling the law, it's not true.

24 MR. YOUNG: I mean, that's a legal
25 issue that we can put on an issue list.

1 MS. COTTINGHAM: Whether or not the
2 Board's de novo review is as of a date certain, I
3 mean, that can be an issue, is what I'm saying.

4 MS. OSBORN: And then there's the
5 practical question of, I mean, what we're talking
6 about are the submittals that are listed on the
7 exhibits. A huge number of plans and reports are
8 expected to come in post issuance of the 401, and
9 how do we deal with these in the context of a very
10 short time frame in which we'll be exchanging
11 discovery and deposing witnesses, witnesses that
12 need to be able to review this information and
13 prepare for it.

14 MR. YOUNG: I think we have an exhibit
15 date that, you know, this is when our exhibits are
16 due.

17 MS. OSBORN: Are we going to do
18 depositions after January 25th; is that what you're
19 proposing?

20 MS. MARCHIORO: We were talking about
21 setting a different exhibit exchange date, so I
22 don't think that's what was stated.

23 MS. OSBORN: What do you propose?

24 MS. MARCHIORO: I don't have a
25 calendar, but early on in January.

1 MS. COTTINGHAM: So you exchange it
2 before the cutoff date?

3 MS. MARCHIORO: And then give that
4 opportunity for any discovery that needs to be done
5 with respect to those documents to be completed
6 within a two-week period or so.

7 MR. EGLICK: Well, that's short.

8 MS. OSBORN: We need to be able to
9 start doing depositions in December.

10 MS. COTTINGHAM: What did you say?

11 MS. MARCHIORO: You can always, as you
12 do in any case, continue the deposition pending any
13 additional information.

14 MR. PEARCE: We're happy to do that.
15 We can continue people's depositions if there's
16 something else that's going to come in that they
17 need to address.

18 MS. OSBORN: Given the number of
19 witnesses, I don't know that that's really a
20 practical approach. I think that we need to know
21 what the information is before we start the
22 depositions.

23 MR. STOCK: And in order to be
24 reasonable, we proposed a November 15 cutoff date
25 for that purpose so that any additional plans that

1 the Port is going to submit to Ecology, any
2 revisions to the existing plans, be provided to
3 Ecology and ACC by November 15. We've got a
4 March 18 hearing date, and we've got to get busy
5 on the discovery, so that is why we chose a
6 November 15 date for that purpose.

7 MR. REAVIS: It seems to me the first
8 thing that needs to happen is to have a little
9 better definition of what plans we're talking
10 about, because some of them may actually be
11 completed pursuant to the 401 before that date.

12 But it would be, I think, a bad idea to move
13 forward with a hard date like that, not knowing
14 what has to be submitted and what doesn't have to
15 be submitted; what is a plan, what is a plan that
16 supports reasonable assurance. Our monitoring data
17 in the future, our construction drawings, a number
18 of the other things that are required on an ongoing
19 basis, are going to be kept out of evidence because
20 they weren't submitted by November 15th. That
21 doesn't seem to make any sense.

22 Now, if it is specific documents, Natural
23 Resources mitigation plan, the WERS, a number of
24 those other documents that can be identified, then
25 I think we'd be in a position to talk about when

1 that could be done. But kind of this vague
2 description with a cutoff date that prevents the
3 Board from considering relevant evidence at the
4 time of trial, I don't think would be appropriate
5 here.

6 MR. STOCK: May I take you up on your
7 offer to have a brief caucus with Ms. Eglick and
8 Ms. Osborn?

9 MS. COTTINGHAM: Go ahead.

10 (OFF THE RECORD.)

11 MS. COTTINGHAM: We're going to go
12 back on the record here.

13 MR. STOCK: November 15 is a
14 reasonable date for submitting any additional plans
15 that the Port and Ecology are going to rely upon.

16 A suggestion that plans be submitted and then
17 experts can be redeposed based upon those
18 additional plans needlessly increases the cost of
19 this hearing and also, I think, gives an unfair
20 advantage to Ecology and the Port because ACC's
21 experts will have to prepare twice then. That is
22 why we are asking for a cutoff date of November 15.

23 Obviously, the schedule is dependent somewhat
24 on what the Board's decision is with respect to the
25 motion for stay. But right now, looking at it, we

1 think November 15, for purposes of submitting those
2 additional plans, is reasonable.

3 MS. COTTINGHAM: Having heard all of
4 the parties, what I'm going to do is set a
5 tentative date of November 15th, and then I'm going
6 to allow Ecology and the Port to go and look at the
7 401 certification to see if there are any plans
8 that are planned to be released at some point in
9 time before the hearing date and to make a special
10 case on those particular plans to have them be
11 admitted and then to allow the appellants the
12 opportunity to take further depositions related to
13 those specific plans.

14 Is that an acceptable approach to having a
15 tentative date, by having the ability outside of
16 that, if there are things that are known to be
17 coming in that you would like to have before the
18 Board?

19 MR. REAVIS: I guess it depends on the
20 definition of plan. As I understand what they're
21 looking for, it's the major deliverables, the
22 Natural Resources mitigation plan, the low flow
23 report, there are a number of things that are
24 specifically identified in the 401 as being due, as
25 opposed to --

1 MS. COTTINGHAM: I would make a
2 distinction between a monitoring report or a
3 periodic report, a difference between that and a
4 plan that would guide future behavior. Is that
5 what you're looking at?

6 MR. STOCK: Yes.

7 MR. YOUNG: What about construction
8 plans?

9 MR. PEARCE: Yeah, those are ongoing.

10 MR. EGLICK: Well, I mean, you know, a
11 construction plan that's kind of ministerial would
12 be one thing, but, for example, as we were talking
13 about on the low flow, I mean, the issue, I mean,
14 they haven't figured out -- well, that would be a
15 different kind of plan.

16 MS. OSBORN: We haven't seen a design
17 plan, for example.

18 MS. COTTINGHAM: So I think I'd like
19 to pick a date and then to allow the Port and
20 Ecology by that date, the 15th of November, to
21 provide to all parties and to the Board a list of
22 those specific plans that you think would come in,
23 and I'm not going to say you by March 18th; I think
24 we have to back it up to, you know, most likely the
25 1st of February; so anything between November 15th

1 and February 1 that you plan to release and then to
2 provide adequate time for you to take further
3 depositions if you choose.

4 MR. PEARCE: We'd suggest another
5 prehearing conference, and we'd also like to hear
6 from ACC what plans they're concerned about. We
7 don't want to have to guess.

8 MS. OSBORN: Look in the 401. I mean,
9 if you can't determine --

10 MR. PEARCE: Rachael, please. If you
11 can tell us, we can look to the 401 and tell you
12 exactly when all of those are coming in.

13 MR. STOCK: I think the guiding
14 principle should be any plan, report, document,
15 analysis other than those that are kept in the
16 normal course of business such as a monitoring
17 reports that the Port or Ecology plan to rely upon
18 at the March 18 hearing to try to convince this
19 Board that there was reasonable assurance on
20 September 21, and of course this is without
21 prejudice to ACC's argument that de novo review is
22 as of September 21.

23 MR. PEARCE: We'll identify all plans
24 by November 15 and what's likely to come in after
25 that's called for in the 401, but if Mr. Stock is

1 talking about every document now, that's just
2 what's going to be subject as to the normal --

3 MS. COTTINGHAM: Discovery cutoff.

4 MR. PEARCE: -- discovery cutoff and
5 exhibit deadline.

6 MR. YOUNG: For example, I mean, the
7 fill certifications, for example, are ongoing.
8 Those are required, you know, when the fill site is
9 tested. You know, construction plans change, you
10 know, as issues are identified during the
11 construction, you know, and some of this project,
12 as I understand it, is not going to be constructed
13 for several years.

14 So, you know, it seems like what the ACC is
15 really talking about is, you know, the stormwater
16 plan, the low flow mitigation plan, the Natural
17 Resources mitigation plan. Those things, certain
18 revisions to those plans, were required by the 401,
19 and, you know, I assume that that's what they're
20 referring to.

21 MS. OSBORN: In our notice of appeal
22 and in the exhibit that we used today, there's
23 quite a list of different documents that are
24 required to be submitted as part of the 401. I
25 mean, we can sit here and go through that list. I

1 don't think that would really be productive.

2 MR. PEARCE: I suggest that we both go
3 through the list and then talk to each other about
4 it and see if we can agree on what's what.

5 MR. REAVIS: Then we can take it up on
6 the 15th.

7 MR. PEARCE: And then we can take it
8 up on the 15th.

9 MS. COTTINGHAM: Of November?

10 MR. PEARCE: Of November.

11 MS. COTTINGHAM: Here's what I've
12 written down. And a definition of plans, I think I
13 heard you then broaden it this last go-round, but I
14 wrote down --

15 MR. STOCK: That wasn't my intent.

16 MS. COTTINGHAM: Well, you said
17 reports.

18 MR. STOCK: Well, reports, plans, you
19 know, low flow mitigation report or whatever it's
20 called, but it's plans, reports, analyses that are
21 being submitted to Ecology for purposes of trying
22 to get to reasonable assurance.

23 MS. COTTINGHAM: But not the routine
24 monitoring or other reports.

25 MR. STOCK: Correct.

1 MS. COTTINGHAM: Okay.

2 MS. MARCHIORO: And that's confusing,
3 because if what Ms. Osborn is saying is what's
4 required by the 401, then if what you're asking for
5 is required by the 401, with the exception of
6 monitoring reports, then I think it's a divine set
7 of documents.

8 It appears that what Mr. Stock is saying is
9 anything that would be used to create additional
10 support for reasonable assurance, and that does go
11 beyond what's required by the 401. There'll be
12 expert reports and other documents created, and
13 those should not be required to be provided any
14 time in advance of the final exhibits as far as
15 unless we're going to have an expert report
16 identification date. But I think this is --

17 MS. COTTINGHAM: I would agree with
18 that. You're looking at the plans and the reports
19 that are required in the 401?

20 MR. STOCK: I am looking at that. I
21 am also thinking about the BMG case where, on the
22 eve of the hearing, the project proponent submitted
23 additional plans, and ultimately the Board used
24 that as evidence that there wasn't reasonable
25 assurance at the time that the 401 was issued.

1 MS. COTTINGHAM: Well, I think if we
2 do the February 1st, that gives you a
3 month-and-a-half to do some additional follow-up.

4 MS. OSBORN: For the discovery cutoff
5 date?

6 MS. COTTINGHAM: We haven't even
7 gotten to all that; it can be linked up later. So
8 any plans that Ecology or the Port identify before
9 November 15th, that they intend to release or rely
10 upon prior to February 1st, that that's then the
11 ultimate cutoff point, and that they need to
12 identify those on or before November 15th, and then
13 allow you time to depose experts or whoever between
14 then, and I will set the end for that discovery
15 period of February 28th just on those newly
16 identified.

17 So this whole discussion came as a jump-in on
18 this one.

19 MR. STOCK: Precursor, right. But I
20 think it's a good segue into discovery cutoff and
21 when the discovery cutoff should be. Mr. Reavis
22 had proposed in his proposed scheduling order here,
23 I see a date of January 18 under paragraph 3A.
24 When we sat down and talked about it, we thought an
25 appropriate date would be February 1.

1 MS. COTTINGHAM: And that coincides
2 with this date that I just picked here.

3 MR. STOCK: Right.

4 MR. EGLICK: But then you can't do
5 them both on the same date.

6 MR. STOCK: Well, the discovery for
7 this purpose would extend until February 28th.

8 MS. COTTINGHAM: Then the narrower
9 discovery would extend to the 28th.

10 MR. STOCK: So we would propose a
11 February 1 discovery cutoff date.

12 MS. COTTINGHAM: Is that acceptable,
13 Mr. Reavis?

14 MR. REAVIS: I think it's fine. I
15 think what it's going to end up doing probably is
16 making it difficult to get dispositive motions
17 decided before the hearing date. If you have until
18 February 1 to have discovery, then you've got to
19 complete that and file your motions, so you're into
20 the first couple weeks of February, which means,
21 you know, the week before the hearing you're going
22 to get a whole bunch of dispositive motions, which
23 will essentially be for naught, because it won't
24 give you time to rule on them before the hearing.

25 MR. STOCK: We had thought about that,

1 and I agree the schedule really gets cramped as you
2 get closer to the hearing date. We had thought if
3 the discovery cutoff is February 1, then give the
4 parties a week for putting the finishing touches on
5 dispositive motions, so dispositive motion cutoff
6 date by February 8. That means that any response
7 would be due February 18, the ten-day response
8 period, and then any reply to the dispositive
9 motions would be due February 25.

10 And, again, you know, we're getting closer to
11 March 18, but at least there's a gap there for the
12 Board to read and consider those dispositive
13 motions before the March 18 date.

14 MR. PEARCE: It doesn't mean that we
15 can't bring them earlier --

16 MR. STOCK: Right, like on water
17 rights.

18 MR. PEARCE: -- if there's something
19 that doesn't require a lot of discovery.

20 MS. COTTINGHAM: So the status report
21 on settlement could continue to be the 8th of
22 February, and the direct testimony --

23 MR. STOCK: With respect to prefiling
24 written direct testimony for purposes of expediting
25 the hearing, I see Mr. Reavis had proposed a

1 February 25 date. We had worked our way back from
2 the March 18 date and are proposing the February 18
3 date for direct testimony of ACC with respondents'
4 direct testimony due on February 25, a week later.
5 That way it gives each party sufficient opportunity
6 to prepare for cross examination of that prefiled
7 direct testimony.

8 We also would propose that any prefiled direct
9 testimony, written testimony, be limited to 30
10 pages and that the Board require the parties to
11 comply with the Superior Court rules with respect
12 to word processing font size, point size, margin
13 size, so that we don't get into this game of trying
14 to cram a 46-page brief into 30 pages or a 45-page
15 brief into 32 pages.

16 MR. PEARCE: Well, that would be fine
17 except there aren't any Superior Court rules.

18 MR. STOCK: King County local rules.

19 MR. PEARCE: It can be King County
20 local rules.

21 MS. COTTINGHAM: Okay.

22 MR. EGLICK: Is that Marquis of
23 Queensberry or something?

24 MR. REAVIS: I think our objection to
25 that proposal, which I think in concept makes

1 sense, is it's hard, I think, if we get direct
2 testimony from ACC on the 18th of February, to turn
3 around our direct testimony on the 25th.

4 MR. PEARCE: In one week for all these
5 people.

6 MR. REAVIS: Yeah, and our experts are
7 going to have to read the testimony and figure out
8 what they have to respond to, as will our other
9 witnesses, and a week is pretty short.

10 MR. PEARCE: I'd suggest 30 days.

11 MS. COTTINGHAM: Let me show a little
12 bit of my ignorance. In any of the cases I've been
13 part of here to date, we haven't had direct
14 testimony filed. So is this a normal practice in
15 front of the Board?

16 MS. MARCHIORO: Yes. In a case of
17 this size, in order to expeditiously be able to
18 move through the witnesses and just for your
19 background --

20 MS. COTTINGHAM: They would still be
21 called as witnesses?

22 MS. MARCHIORO: What would happen is,
23 and it started with the net pen case, which got a
24 little out of control, and I think it came into a
25 better process as we moved forward, there would be

1 a 10 or 15-minute overview of the testimony without
2 recitation of everything in the testimony, and then
3 cross examination would begin.

4 But one thing that might be assisting here is
5 that given if we are really intending to make this
6 a two-week trial, and knowing that the Board's day
7 is approximately six hours, if, taking the math,
8 each side is given "X" number of hours, and as you
9 did today during the oral argument, you kept track,
10 I've seen that done in federal court and it's
11 worked rather well, so each side knows how many
12 hours it has to work with the presentation of its
13 case, and no one side gets extra time unless they
14 cede to the other side.

15 MS. COTTINGHAM: In lieu of the direct
16 testimony or to help manage?

17 MS. MARCHIORO: I'm talking about
18 helping manage. I think the written direct
19 testimony is the appropriate way to manage direct
20 examination. I think as far as overall management
21 of the hearing, the division of time and tracking
22 of it would be very helpful in keeping everyone
23 succinct and to the point.

24 MR. EGLICK: I know in Battle Mountain
25 Gold, and Rachael will probably speak to this, but

1 at least I think I know in Battle Mountain Gold
2 they did that. That was the procedure.

3 MS. OSBORN: That's correct.

4 MS. MARCHIORO: No time was kept,
5 though.

6 MR. EGLICK: But, I mean, prefiled
7 direct.

8 MS. OSBORN: We ended up going quite a
9 bit shorter, several days shorter, than we had
10 anticipated.

11 MS. MARCHIORO: Well, if you continue
12 to have approximately 40-some witnesses, though, I
13 think we're looking at 60 or so witnesses unless
14 everyone decides to whittle -- I have concerns
15 about two weeks in just the sheer number of
16 witnesses that have been identified.

17 MR. EGLICK: I guess I didn't think
18 we -- I mean, some of our witnesses are really
19 Ecology folks and so on, so I'm not sure we really
20 have --

21 MS. MARCHIORO: They're not ones that
22 have been identified by Ecology as witnesses.

23 MR. EGLICK: But, actually, it was
24 done even before the net pen case I think you were
25 involved in; I think it was done maybe 10 or 15

1 years ago that I did actually another net pen case
2 where we did the prefiled, and it worked really
3 well.

4 MS. COTTINGHAM: Okay. It's just I
5 haven't had any experience.

6 MS. GOODWIN: It's been done in
7 shoreline cases for years and works well.

8 MR. STOCK: In terms of time between
9 when ACC files its prehearing direct testimony and
10 respondents file their prehearing direct testimony,
11 we propose February 18 for ACC, February 25 for
12 respondents.

13 That gives a week. I think that's sufficient
14 time, because I suspect Ecology and the Port could
15 sit down today and write their direct testimony.
16 Any revisions that need to be made to that written
17 direct testimony can be done, the finishing touches
18 can be put on that direct testimony within that
19 one-week period of time.

20 The reason why February 25 is important is we
21 do have a March 18 hearing date. February is a
22 short month. In order for ACC to be able to
23 prepare cross examination of the direct testimony,
24 that only gives ACC three weeks.

25 MR. JONES: But yet the Port and

1 Ecology are asked to prepare rebuttal, what is in
2 essence responsive or rebuttal testimony, in a
3 week. It's kind of a double standard.

4 MR. PEARCE: Absolutely impossible.

5 MR. STOCK: That is not rebuttal
6 testimony. That is your direct testimony. I
7 assume you will want to save your rebuttal for oral
8 cross examination of the written statements.

9 MS. MARCHIORO: It's not a week, I
10 don't believe. I think that the Martin Luther King
11 holiday is in there.

12 MR. YOUNG: It's Presidents' Day.

13 MS. MARCHIORO: Presidents' Day, so
14 there's a glitch as far as the rules.

15 MR. PEARCE: Our direct testimony is
16 going to be expert testimony rebutting their
17 experts. An incredible number of issues have been
18 raised. They're all highly technical. We only
19 have so many lawyers. It's going to take us, I
20 think, at least three weeks to get those
21 rebuttal --

22 MS. COTTINGHAM: Why don't we cut the
23 baby in half here and pick the same date we picked
24 earlier, which is the last day of February,
25 February 28th. That gives you a few more days.

1 MR. PEARCE: Well, then, why don't we
2 back them up a little.

3 MR. JONES: Right, and do the same
4 back for discovery cutoff.

5 MR. PEARCE: Back them up to the 11th
6 or back them up to the 14th and give us at least
7 two weeks. It's a real hardship to try to get, you
8 know, 15 experts on 70 different issues to address
9 all their experts' concerns and all their reports.
10 You saw how much was filed just in the motion to
11 stay and all the issues that were raised.

12 MS. COTTINGHAM: Are you going to work
13 over that weekend? Can we back it up to Friday at
14 the close of business on the 15th?

15 MR. EGLICK: In this case we seem to
16 be working every weekend, I'm sorry to say.

17 I think, you know, one thing --

18 MS. COTTINGHAM: It's just that I want
19 to make sure that we give the Board enough time to
20 take a look at the direct testimony.

21 MR. STOCK: That's fine, February 15.

22 MS. COTTINGHAM: So that then backs
23 them up.

24 MS. MARCHIORO: Thank you.

25 MR. EGLICK: I don't know whether this

1 needs to be addressed now, but in the case I did
2 that had the prefiled testimony, which was a fairly
3 complex case having to do with modeling of wastes
4 in, I think, Discovery Bay or something, one of
5 these net pen cases, one of the things that they
6 did was they did the time limits that Joan was
7 talking about, and that made sense.

8 They also limited the opening introduction
9 overview so that someone didn't come in and go
10 outside their prefiled testimony for 20 minutes or
11 something and then no one would have responded or
12 prepared to cross on that.

13 And I think the other thing they did was
14 actually limit the length of the prefiled also, and
15 that was something that I remember opposing but the
16 Board was really anxious to have.

17 MS. COTTINGHAM: Well, Mr. Jensen and
18 I have talked about it, and if you expect us to
19 read it before, you either need to give it to us
20 far in advance or make sure you use some
21 constraint.

22 MR. EGLICK: Right. And that's just
23 what I remember about how that worked.

24 MR. STOCK: And we are proposing 30
25 pages, and we came up with the 30 pages because

1 looking at all of the declarations that the various
2 parties have filed, it seems that the longer ones
3 were around 30 pages, so I think 30 pages is a
4 reasonable amount, and if all the parties agree to
5 comply with the King County local rule on word
6 processing --

7 MS. COTTINGHAM: Font sizes?

8 MR. STOCK: Yes, whatever it is,
9 points, space between lines.

10 MS. COTTINGHAM: Thirty pages is a
11 standard page limit when we need to deal with
12 prehearing briefs.

13 MR. PEARCE: I think that's fine.

14 MS. MARCHIORO: That's fine.

15 MR. STOCK: Then the next item on
16 Mr. Reavis's proposed schedule was the hearing
17 briefs not to exceed 30 pages on March 11, and we
18 are in agreement with that.

19 MS. COTTINGHAM: And I would assume
20 there will be no attachments with the hearing
21 briefs.

22 MS. MARCHIORO: Can we just, then,
23 refer to our exhibits that we plan to submit?

24 MS. COTTINGHAM: Yes.

25 MR. PEARCE: I'd put it in the order.

1 MS. COTTINGHAM: Yes. No attachments.
2 If you want an attachment, it's got to fit in the
3 30 pages. But, I mean, the hearing briefs are not
4 the opportunity to be providing evidence anyway.

5 MR. STOCK: One date that we skipped
6 over was his 3B on final witness and exhibit lists.
7 He's proposing January 25. Given the discovery
8 cutoff is February 1, I think it makes sense to
9 have a date of February 1.

10 MR. REAVIS: Or a week after, I think
11 is the way --

12 MR. STOCK: Or a week after.

13 MS. COTTINGHAM: February 8.

14 MR. PEARCE: It would be good if we
15 have a preliminary date for exhibits as well.

16 MS. COTTINGHAM: Everybody has
17 submitted their preliminary lists.

18 MR. PEARCE: I know, but ACC's
19 preliminary list is just every document that EGG
20 ever generated, every document that Parametrix ever
21 generated, every document that was ever submitted
22 from the ACC, every document that was ever given to
23 Ecology. It's not really an exhibit list. We
24 would like more detail.

25 MS. COTTINGHAM: Is there any way we

1 can also -- it doesn't have to be the final list
2 but a preliminary list by November 15th.

3 MR. PEARCE: That actually names
4 documents.

5 MR. STOCK: The idea on the
6 preliminary list was to give a general overview of
7 the documents. The Port's, and I don't know how
8 you generated the Port's, but it looked like a data
9 dump to me from your document database, but --

10 MR. PEARCE: You're right, you don't
11 know how we generated it. We generated it by
12 looking at all the documents that have been
13 provided to not only Corps of Engineers but to
14 Ecology, and it was a list of over 2,200 documents
15 that we actually went through and actually took the
16 Board's order to provide our exhibit list
17 seriously.

18 MS. COTTINGHAM: I'm not going to hold
19 you to having to have everything on the preliminary
20 list, but we already set November 15th as an
21 interim deadline anyway for them to identify future
22 plans, so if we put that as November 15th --

23 MR. STOCK: Sure.

24 MR. EGLICK: We can do that. Part of
25 the problem is that, you know, I walked in the

1 office last night and I had an e-mail, or my
2 paralegal did that she had forwarded to me, from
3 Ann Kinney of DOE from Saturday attaching some more
4 documents. So we were doing generic lists because
5 we still don't have apparently the full picture of
6 what led up to the decisions, but by November 15th,
7 hopefully there won't be more, I hope. I mean,
8 we've already talked about new stuff, but the old
9 stuff we should have by then.

10 MS. MARCHIORO: I'm sorry. 11/15 will
11 be the next date for our lists?

12 MS. COTTINGHAM: November, yeah.

13 MS. MARCHIORO: Thank you.

14 MS. COTTINGHAM: Are there any other
15 dates in here that we need to -- let's see,
16 dispositive motions, and like I said, I'd like to
17 have us cover both dispositive motions and
18 nondispositive motions so that we can deal
19 expeditiously with nondispositive motions, like
20 motions to strike.

21 MR. STOCK: On nondispositive motions,
22 I think it is important that the parties be given
23 an opportunity to respond, and the response can be
24 fairly quick; a week, five days, as a response
25 would be my suggestion.

1 MR. REAVIS: The standard King County
2 rule is six to seven days from the filing of a
3 motion to the hearing on the motion. In between
4 then, you have the five-day response and then one
5 day later you get to reply.

6 MS. COTTINGHAM: So could somebody lay
7 that out specifically, not just by cross-reference
8 to local rules?

9 MR. JONES: I would suggest that we
10 just adopt the same dates as local rule 7, which is
11 the one that Gil is making reference to, and we can
12 incorporate those right into the orders.

13 MS. COTTINGHAM: Yeah, specific rather
14 than as a cross-reference.

15 MR. JONES: Right. Like just, say,
16 take the text out, type it into the order, and then
17 everybody knows what's going on.

18 MR. EGLICK: That will work unless
19 there's, like, two other things due that day, in
20 which case we might ask for some dispensation, but
21 in the normal course, a week is fine.

22 MR. STOCK: In terms of all this other
23 material in Mr. Reavis's proposed order --

24 MS. COTTINGHAM: I'm sure it just
25 pulls out of the usual Board -- what I'd like to do

1 is I'd like to download the form that I use so that
2 you know any particularities that I might have, and
3 it only needs to be set up for my signature.

4 So what I'd like to suggest is, based on the
5 conversation that we've had today, that somebody do
6 a draft, circulate it among all of you, and then
7 submit it to me as a draft before it's all signed
8 off on or whatever. It will come to me, I'll print
9 it out and I'll sign it, rather than you having to
10 all -- I'd just like to have some sort of
11 acknowledgement that you all agreed to it, but you
12 don't have to sign on it that you agreed to it.

13 MR. REAVIS: And this was pulled in
14 large part from one in the Hanford case.

15 MS. COTTINGHAM: Right, which
16 Mr. Tupper's preferences may not be mine.

17 MR. REAVIS: There's a couple of other
18 issues. I just wanted to point out that when I was
19 drafting this over the weekend, on the hearing date
20 it says, "The hearing is estimated to continue
21 for...," and I plugged in four weeks here just kind
22 of looking at the number of witnesses. I think the
23 current schedule says two weeks.

24 MS. COTTINGHAM: Current schedule says
25 two weeks, and if you want more time, at this point

1 in time it's out in July or August, which we've
2 already heard that they don't want to hear.

3 The only thing is that as we get closer to
4 March, other cases settle, and, I mean, if it looks
5 like we're going to go longer, we can start
6 plugging in, but right now we don't have any
7 vacancies.

8 MR. REAVIS: I just wanted to have a
9 placeholder there that, as we get closer, we may
10 determine the two weeks just won't do it.

11 MS. COTTINGHAM: But I wouldn't plug
12 in a number. I would say if it appears that it's
13 going to take longer, that the Board will use its
14 effort to, you know, maybe bifurcate the case into
15 available dates rather than moving the whole case,
16 which is troublesome, but --.

17 MR. PEARCE: Our client has also
18 expressed a desire to get it done in March if at
19 all possible.

20 MR. REAVIS: There is one other issue
21 that I plugged in here just to sort of prevent a
22 repeat of Mr. Luster and his deposition, and that
23 is a requirement that all parties cooperate, and
24 for someone who has a declaration submitted by a
25 particular party, that party that submits the

1 declaration has to agree to make that witness
2 available for deposition even if out of state, and
3 in addition to making them available for
4 deposition, that they produce documents that would
5 normally be obtained by a subpoena duces tecum.

6 MS. COTTINGHAM: For out of state?

7 MR. REAVIS: For out of state. And I
8 don't want to reargue that issue, but I think that
9 our view is we did follow California law for the
10 issuance of a California subpoena in connection
11 with that case. We just want to avoid a repeat of
12 that in the future by having everybody agree that
13 their witnesses will be made available without the
14 necessity of a subpoena in the future, because
15 there are a number of out-of-state witnesses.

16 MR. PEARCE: And by the same token, we
17 made our out-of-state witnesses available. There's
18 several from the East Coast.

19 MS. COTTINGHAM: I think I set that
20 forth in my order, that in the future you need to
21 do it by consensus. So that's basically what
22 you're saying.

23 MR. REAVIS: Yeah, and I think I
24 plugged in some more specific language here that
25 you have an obligation to make them available; if

1 you don't, then they can't appear at the hearing.
2 And they also have to produce documents. I think
3 those were the two additional items.

4 MS. COTTINGHAM: One of the things I
5 might suggest is once you plug the dates in that
6 we've discussed here, rather than submitting it
7 around to the parties for agreement first, why
8 don't you submit it to me, and on the language, not
9 the dates but on the language, let me take a look
10 at it first to make sure I'm comfortable with it.

11 And I will give you my e-mail address so you
12 can do it electronically.

13 MR. STOCK: May we also have a copy of
14 that and be able to comment on it?

15 MS. COTTINGHAM: Well, what I was
16 going to say is let me make sure that some of the
17 kind of standard language meets my needs. I'll
18 send it back to him, and then you guys can argue
19 about the details from there and then submit it
20 back to me for your final.

21 MR. PEARCE: Just send this to you by
22 e-mail?

23 MS. COTTINGHAM: Yeah.

24 MR. REAVIS: With the revised dates.

25 MS. COTTINGHAM: Yeah.

1 MR. EGLICK: Since there's a court
2 reporter here, I just wanted to say that whatever
3 problems there were in the past that were not -- I
4 don't know that there was no cooperation from ACC;
5 I think there were some problems with Mr. Luster's
6 deposition, but they were not on ACC's part.

7 MR. PEARCE: We're not saying that
8 people didn't cooperate. We just want, you know,
9 all parties to have ease of access to discovery in
10 the future. I mean, we're on a tight time line
11 with this.

12 MR. EGLICK: That's fine.

13 MS. COTTINGHAM: And it's probably to
14 the advantage of all of you to identify all of your
15 out-of-state people and agree up front on something
16 that can work into their schedules as well.

17 MR. PEARCE: Absolutely.

18 MS. COTTINGHAM: So is there anything
19 else schedule-wise? The parties have agreed to
20 deal with the issues getting together and by
21 stipulation agreeing what the issues are, so --.

22 MR. STOCK: One other request, and
23 hopefully we'll get agreement on this, is no
24 discovery between Christmas and New Year's.

25 MS. COTTINGHAM: That is agreed.

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MR. EGLICK: Don't forget
Thanksgiving.

MR. STOCK: Well, at least between
Christmas and New Year's, because I think a number
of people use that as family time.

MR. EGLICK: And Thanksgiving.

MS. COTTINGHAM: And no state
holidays, and that covers Thanksgiving.

MR. EGLICK: Thank you.

MR. YOUNG: You mentioned wanting to
set a schedule on this attorney-client issue.

MS. COTTINGHAM: Oh, yes. I'm viewing
the motion for reconsideration as a response, so
I'm going to give you seven days to reply to that,
starting today.

MR. YOUNG: Okay. Very well.

MS. COTTINGHAM: Anybody else have any
other issue to deal with?

And I mentioned in the hearing in there if you
could get by Thursday of this week anything on the
declarations.

MR. PEARCE: Can I clarify one -- oh,
go ahead, Gil.

MR. REAVIS: I was just going to say
on the list of issues, and this is language I

1 pulled from that other order, I suspect that there
2 will be issues as to which we just don't agree are
3 issues, and the way this is drafted is we have a
4 list of what we agree to be issues, and if one
5 party or the other has a suggestion for an issue
6 that the other side doesn't agree with, they
7 identify that in a separate list and that the other
8 party have a chance to at least explain why they
9 think that should not be an issue.

10 MS. COTTINGHAM: Then let's pick a
11 date by which we'll get the first iteration of
12 that.

13 MR. REAVIS: Well, the date that's in
14 here is November the 15th. That's the date, I
15 think, we're going to consider some of these other
16 matters, so we could conceivably move that up by a
17 week or so, so that we could have that to you.

18 MS. COTTINGHAM: Why don't we have
19 that be the 1st of November.

20 MR. STOCK: What I would suggest,
21 ACC's list is fairly comprehensive, and last night,
22 in comparing the Port's list and ACC's list, there
23 is a lot of overlap, and I think we've picked up
24 each one of yours, maybe phrased a little
25 differently, but if we work from ACC's list, I

1 think that's the most comprehensive list, and then
2 if there's others or if you don't agree with it,
3 then we can proceed that way.

4 MS. COTTINGHAM: So November 1st
5 works?

6 MS. MARCHIORO: What day of the week
7 is that, please?

8 MR. YOUNG: November 1st is Thursday.

9 MR. PEARCE: For our submittal on
10 November 15th, can I just clarify? We're going to
11 try to get more clarity from everyone on not a
12 final exhibit list but an exhibit list, but could
13 we also try to get more clarity on witnesses?
14 There's really a large number of witnesses, and
15 some witnesses have designations which just say
16 people at So-and-so, and So-and-so at Parametrix
17 and maybe others. If possible, I'd really like to
18 see, you know, the list of names and try to get
19 that winnowed down

20 MR. JONES: The real concern is that
21 if you're going to start doing a discovery schedule
22 of depositions, I mean, it's already apparent if we
23 start from the witness list that's been identified
24 by the two sets of parties, we're going to have to
25 double-track deps, which is just fine, but I don't

1 want to note depositions for people who aren't actually
2 going to have testimony submitted. And it's going
3 to be tight enough as it goes.

4 So it would be helpful, as Mr. Eglick
5 conceded, they've got some people that they
6 don't -- they identified some of our witnesses,
7 which I understand is a preliminary list, but now
8 that we're really getting down to brass tacks, see
9 whose deposition we need to note and prepare for.

10 MS. COTTINGHAM: So you're asking for
11 clarified witness lists as well by November 15th?

12 MR. JONES: Yes.

13 MR. PEARCE: Yes, thank you, if that's
14 possible.

15 MS. COTTINGHAM: Can you build that in
16 as well?

17 MR. REAVIS: Yes.

18 MS. COTTINGHAM: Now, one other thing
19 that's missing on this issue list is we have
20 November 1st for the proposed list of agreed
21 issues. We need kind of a rebuttal period. So you
22 wanted a week for that?

23 MR. REAVIS: I think that we should be
24 able to -- well, that probably does make sense. A
25 week is fine.

1 MS. COTTINGHAM: Hold on. I'm in the
2 wrong month.

3 MS. MARCHIORO: The 8th of November.

4 MS. COTTINGHAM: Yeah. Why don't we
5 set it for the 15th. That's kind of a uniform date
6 through here.

7 MR. YOUNG: For the --

8 MS. COTTINGHAM: Kind of the rebuttal
9 on any of the nonconsensus issues.

10 Okay. I can either send you kind of the draft
11 form I use or you can send me something subsequent.
12 But actually I'd probably feel more comfortable if
13 I just gave it to you by e-mail first.

14 MR. REAVIS: Okay.

15 MS. COTTINGHAM: So then the parties
16 can see all of the stuff.

17 MR. REAVIS: And I can distribute it
18 to everybody.

19 MR. PEARCE: We'll distribute it to
20 everyone, of course.

21 MS. COTTINGHAM: Can you give me your
22 e-mail address?

23 MR. REAVIS: Let me give you a
24 business card. I think it's on there too.

25 MS. COTTINGHAM: Another point that I

1 should make, and I have not discussed with the
2 Board's counsel on this, is that sometime in
3 January, or maybe subsequent, we're going to have a
4 new Board member here, unless of course that person
5 is conflicted for any reason. Having not sat in on
6 the stay motion I don't think precludes them from
7 sitting in on the final case. If they're not
8 appointed until the week before the hearing, that
9 might be a different subject.

10 But unless there's any strong objections from
11 the parties, I think if there is a new Board
12 member, they will probably sit on this appeal. So
13 I think you should keep in mind all the copies need
14 to be still three copies and an original.

15 And I also need to remind you on the fax page
16 limits; we don't want to be getting 30-page faxes
17 in here, especially when they start kicking in at
18 about two minutes to 5:00. So, anyway, just kind
19 of a reminder. But those are all set forth in kind
20 of the form that I use.

21 MR. REAVIS: Okay.

22 MS. COTTINGHAM: All right. Thank you
23 all.

24 MR. STOCK: Thank you, Your Honor.

25 MR. REAVIS: Thank you.

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MR. PEARCE: Yes, thank you.

MS. COTTINGHAM: Then we are
adjourned.

(PROCEEDINGS CONCLUDED
AT 12:35 P.M.)

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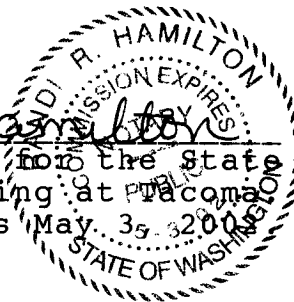
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COUNTY OF PIERCE)

I, Randi R. Hamilton, Notary Public in and for the State of Washington, residing at Tacoma, do hereby certify:

That the annexed and foregoing Transcript of Proceedings consisting of 56 pages was reported by me and reduced to typewriting by means of computer-aided transcription;

That said transcript as above transcribed is a full, true and correct transcript of my shorthand notes of the aforementioned proceedings heard on October 15, 2001.

Randi R. Hamilton
Notary Public in and for the State of Washington, residing at Tacoma.
My commission expires May 31, 2004.



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